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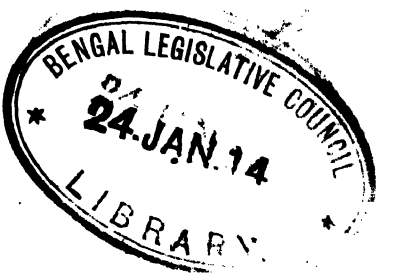

BY

EDWARD JENKS, M.A.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW,
READER IN ENGLISH LAW IN THE UNIVERSITY OF OXFORD,
TUTOR AND LECTURER OF BALLIOL COLLEGE.

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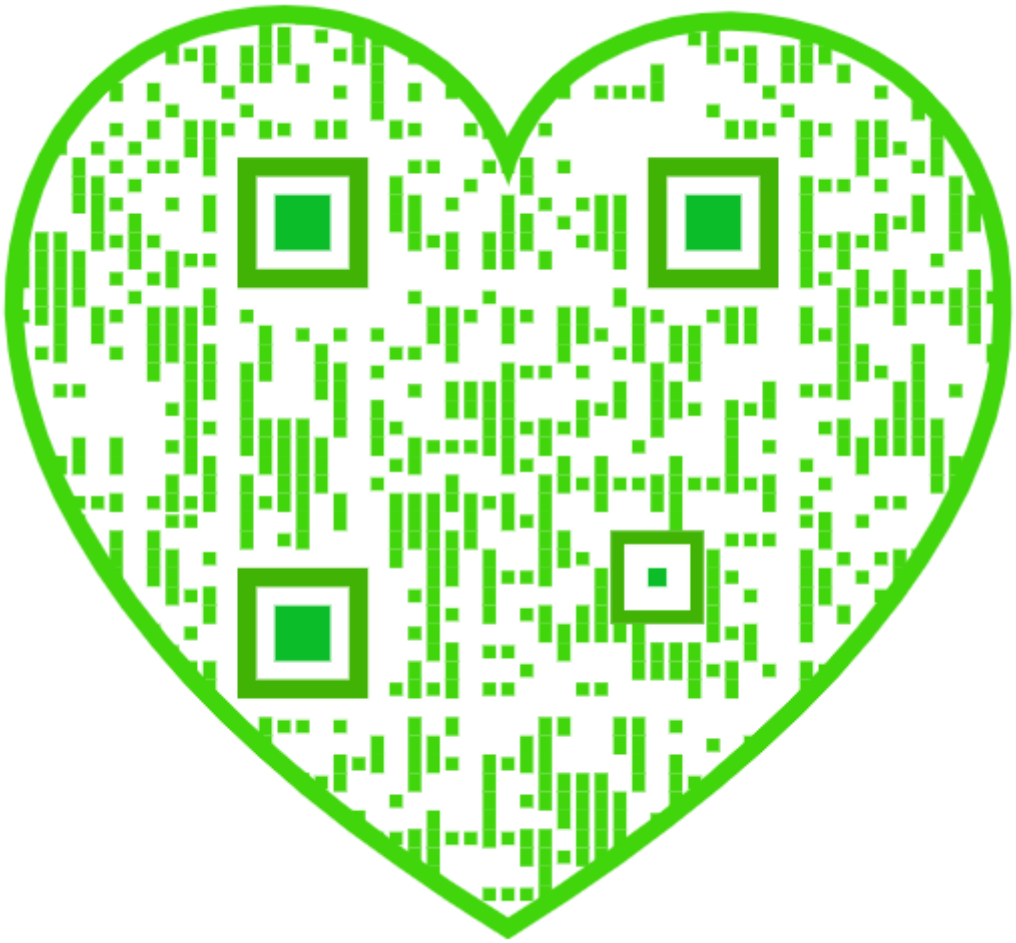

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PREFACE.

TWENTY years' experience as a student, and some ten years of teaching, have led the author, rightly or wrongly, to the conclusion, that there is room for another textbook on the important and difficult subject of English Land Law. The class of readers by whom, as it appears to him, such a book is especially needed, consists of those students who, either at the Universities or elsewhere, have to get up their law without the attractions, or distractions, of professional surroundings. But he ventures to think that there are others to whom the book will be useful.

Needless to say, the author has not endeavoured to recommend his work by originality of views, nor by criticism of accepted doctrines. Modern English Land Law is a dogmatic system, which rests entirely on authority; and its contents are, with a few exceptions, free from doubt.

Again, the author has not allowed himself to dwell upon that most fascinating side of his subject, its history and antiquities. To say nothing of the fact that his own special topic demands all his ability, and all the space at his disposal, it would be useless for him to attempt to do again what has been so well done by Sir Kenelm Digby, in his *Introduction to the History of the Law of Real Property*. It is, on the other hand, the author's hope, that his book may serve as an useful appendage to Sir Kenelm Digby's

work; and he ventures to think, that the student who fairly masters both, will have a sound acquaintance with the principles of the subject.

But, in preparing his book, the author has kept two objects steadily in view. In the first place, he has endeavoured to state the result of the authorities, rather than the authorities themselves. To the student unfamiliar with the professional atmosphere, the language of statutes and judicial decisions is apt to be a trifle bewildering. And if, to the inevitable difficulties of the authorities, are added the difficulties of the commentator, the student may be forgiven if he sometimes despairs. In the following pages, the author has tried to combine authority and commentary in clear language. No one can realize more fully than himself the ambitious character of this attempt; it must be for his readers to say whether, or rather, how far, he has failed. But against one misapprehension, the author must protest. To give the essence and meaning, rather than the words, of the authorities, is not to neglect the authorities. Every statement in the text will be found to be fortified by the citation of its appropriate authority.

In the second place, the author has endeavoured to make each statement in his book appear precisely at the point at which the student would naturally expect to find it. By the practitioner, anything that savours of method is too often regarded with suspicion; but the author hopes to be able to convince even the practitioner, that it is easier, and therefore speedier, to consult a book based on a logical arrangement, than a work in which a mass of information is heaped up in the traditional style. And, whether he succeed or not, it is his duty, as well as his pleasure, to show the student the advantages of approaching a subject on a well-considered plan, expressly designed to avoid repetition and omission. That he has not lived up to his ideal in this respect, the author is only too painfully aware. But it has been some satisfaction to him to find, as the

work has progressed, that the fragments of the puzzle have seemed gradually to fit into one another.

It is the author's grateful task to acknowledge the kindness of those who have assisted him in his work. To his friend Mr. J. E. Harman, B.A., of Lincoln's Inn, who has spared time from his professional engagements to read the whole of the proof-sheets, his warmest thanks are owing. Although Mr. Harman takes, of course, no responsibility for the correctness of the statements in the book, it is due especially to him to say, that he considers the concluding part of Chapter XXV (on the powers of trustees) to be irrelevant to the matter in hand. No doubt he is strictly right; but the author has, after much reflection, and consultation with other friends, decided that, while the pages in question can hardly inconvenience any reader of the book, they may be of considerable convenience to the readers for whom it is primarily intended.

Those who have some practical acquaintance with the infinite mechanical difficulties of a work such as the present, will readily extend to the author their sympathy on the subject of the somewhat formidable list of *Errata*, with which it commences. That this list is not much longer, is due largely to the kindness of Mr. T. W. Marshall, B.C.L., of Lincoln College, who, in addition to the labour of preparing the Index, has voluntarily undertaken the final revision of the proof-sheets for the press.

Finally, the author desires to acknowledge the courtesy of the Warden and Fellows of All Souls College, who have accorded him exceptional privileges in the use of their valuable library, during the preparation of his work.

BALLIOL COLLEGE:
April 30, 1899.

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ABBREVIATIONS USED IN REFERENCES TO CASES.

A.

ABBREVIATIONS.	FULL TITLE.	DATES.
A. C.	Law Reports, Appeal Cases ...	1891–1899
A. & E.	Adolphus & Ellis (Queen's Bench)	1834–1840
Amb.	Ambler (Chancery)	1737–1783
Atk.	Atkyns (Chancery)	1736–1755

B.

B. & Ad.	Barnewall & Adolphus (King's Bench)	1830–1834
B. & Ald.... ...	Barnewall & Alderson (King's Bench)	1817–1822
B. & C.	Barnewall & Cresswell (King's Bench)	1822–1830
Barn. Chy. ...	Barnardiston (Chancery)	1740–1741
Beav.	Beavan (Chancery)	1838–1866
Bing.	Bingham (Common Pleas)	1822–1834
Bing. N. S. ...	Bingham (New Cases)	1834–1840
Bli. ... ...● ...	Bligh (House of Lords)	1819–1821
Br. Cha. Ca. (*or* Bro. C. C.)	Brown (Chancery)	1778–1794
Bro. P. C. ...	Brown (Parliamentary)	1702–1800
B. & S.	Best & Smith (Queen's Bench) ..	1861–1869
Burr.	Burrow (King's Bench)	1757–1771

C.

Campb. ...	Campbell (Nisi Prius)	1808–1816
Cart.... ...	Carter (Common Pleas)	1664–1676
Carth. ...	Carthew (King's Bench)	1686–1701
C. B.... ...	Common Bench	1845–1856
C. B. (N. S.)	Common Bench (New Series)	1856–1865
Ch.	Law Reports, Chancery Division	1891–1899
Ch. D. ...	Law Reports, Chancery Division	1875–1890
Cha. Ca. ...	Cases in Chancery	1660–1688
Cha. Rep.	Reports in Chancery	1615–1712
Cl. & F. ...	Clark & Finnelly...	1831–1846
Cowp. ...	Cowper (King's Bench)	1774–1778
Cox	Cox (Chancery)	1783–1796
C. & P. ...	Carrington & Payne (Nisi Prius)	1823–1841
C. P. D. ...	Law Reports, Common Pleas Division ...	1875–1880
Cr. M. & K.	Crompton, Meeson, & Roscoe (Exchequer)	1834–1836
Cro. Eliz. Cro. Jac. Cro. Car.	Croke, *tempp.* Elizabeth, James I, and Charles I ... ... ●	1582–1641
Curt.	Curteis (Ecclesiastical)	1834–1844

D.

ABBREVIATIONS.	FULL TITLE.	DATES.
Dea. & Sw.	Deane & Swabey	1855–1857
De G. F. & J.	De Gex, Fisher, & Jones (Chancery)	1860–1862
De G. J. & S.	De Gex, Jones, & Smith (Chancery)	1862–1866
De G. M. & G.	De Gex, Macnaghten, & Gordon (Chancery)	1851–1857
De G. & S.	De Gex & Smale (Chancery)	1846–1852
Doug.	Douglas (King's Bench)	1778–1781
Dow & Cl.	Dow & Clark (House of Lords)	1827–1832
Dr. & W.	Drury & Warren (Irish Chancery)	1841–1843
Drew.	Drewry (Chancery)	1852–1859

E.

E. & B.	Ellis & Blackburn (Queen's Bench)	1852–1858
E. & E.	Ellis & Ellis (Queen's Bench)	1858–1861
Ed.	Eden (Chancery)	1757–1767
Eq. Ca. Ab.	Equity Cases Abridged	1667–1744
Exch.	Welsby, Hurlstone, & Gordon	1847–1856
Ex. D.	Law Reports, Exchequer Division	1875–1880

F.

F. Moo.	Francis Moore (King's Bench)	1512–1621
Fost. & Finl.	Foster & Finlason (Nisi Prius)	1858–1867
Freem. Cha. Ca.	Freeman (Chancery)	1660–1706
Freem. K. B.	Freeman (King's Bench)	1670–1704

G.

Giff.	Giffard (Chancery)	1857–1865

H.

H. Bl.	Henry Blackstone (Common Pleas)	1788–1796
H. & C.	Hurlstone & Coltman (Exchequer)	1862–1865
H. L. C.	Clark (House of Lords)	1847–1866
H. & N.	Hurlstone & Norman (Exchequer)	1856–1861
Hob.	Hobart (King's Bench)	1603–1625

I.

Inst.	Coke's *Institutes*	–
Ir. R.	Irish Reports	1894–1899

J.

John.	Johnson (Chancery)	1859
John. & H. (*or* J. & H.)	Johnson & Hemming (Chancery)	1860–1862

K.

Keb.	Keble (King's Bench)	1661–1679
Keil.	Keilway (King's Bench)	1496–1531
K. & J.	Kay & Johnson (Chancery)	1854–1858

L.

L. J.	Law Journal Reports	1823–1831
L. J. (N. S.)	Law Journal Reports (New Series)	1832–1899
L. R. App. Ca.	Law Reports, Appeal Cases	1875–1890
L. R. C. P.	Law Reports, Common Pleas	1865–1875
L. R. Ch. App.	Law Reports, Chancery Appeals	1865–1875
L. R. Eq.	Law Reports, Equity	1865–1875
L. R. Exch.	Law Reports, Exchequer	1865–1875

ABBREVIATIONS.	FULL TITLE.	DATES.
L. R. H. L. C.	Law Reports, House of Lords Cases	1865–1875
L. R. P. & D.	Law Reports, Probate & Divorce	1865–1875
L. R. Q. B.	Law Reports, Queen's Bench	1865–1875
L. T.	Law Times Reports	1859–1899
Leon.	Leonard (King's Bench)	1540–1615
Litt.	Littleton (Common Bench & Exchequer)	1626–1631
Lutw.	Lutwyche (Common Pleas)	1682–1704
M.		
Mac. & G.	Macnaghten & Gordon (Chancery)	1849–1851
Madd.	Maddock (Chancery)	1815–1822
Mer.	Merivale (Chancery)	1815–1817
Mod.	Modern Reports (King's Bench)	1669–1732
Moo.	Moore (King's Bench)	1512–1621
Moo. P. C.	Moore (Privy Council)	1836–1862
Moo. & P.	Moore & Payne (Common Pleas)	1828–1831
M. & S. (*or* Maule & S.)	Maule & Selwyn (King's Bench)	1813–1817
M. & W.	Meeson & Welsby (Exchequer)	1836–1847
Myl. & K.	Mylne & Keen (Chancery)	1832–1835
P.		
P.	Law Reports, Probate	1891–1899
P. D.	Law Reports, Probate Division	1875–1890
Plowd.	Plowden's Commentaries (Queen's Bench)	1550–1580
Poph.	Popham (King's Bench)	1592–1627
Pre. Cha.	Finch (Chancery)	1689–1723
P. Wms.	Peere Williams (Chancery)	1695–1736
Q.		
Q. B.	Adolphus & Ellis (New Series)	1841–1852
Q. B. D.	Law Reports, Queen's Bench Division	1875–1890
R.		
R. C.	Ruling Cases	–
Rep.	Coke	1572–1616
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Rot. Par.	Rotuli Parliamentorum	Edw. I.–Hen. VII.
Russ.	Russell (Chancery)	1826–1829
S.		
Salk.	Salkeld (King's Bench)	1689–1712
Sch. & Lef.	Schoales & Lefroy (Irish Chancery)	1802–1809
Shower, P. C.	Shower (Parliament)	1694–1699
Sid.	Siderfin (King's Bench)	1657–1670
Sim.	Simon (Chancery)	1826–1849
Sm. & G.	Smale & Giffard (Chancery)	1852–1857
Stra.	Strange (King's Bench)	1716–1749
Swanst.	Swanston (Chancery)	1818–1819
Sw. & Tr.	Swabey & Tristram (Probate & Divorce)	1858–1865
T.		
T. R.	Durnford's & East's Term Reports (King's Bench)	1785–1800

V.

ABBREVIATIONS.	FULL TITLE.	DATES.
Ventr.	Ventris (King's Bench)	1668–1691
Vern.	Vernon (Chancery)	1681–1720
Ves. Sr.	Vesey, Senior (Chancery)	1747–1756
Ves. Jr.	Vesey, Junior (Chancery)	1787–1816

W.

W. Bl.	Sir William Blackstone (King's Bench)	1746–1780
Wils.	Wilson (Chancery)	1818–1819
W. R.	Weekly Reporter	1853–1899

Y.

Y. B.	Year Books (ed. of 1679)	Edw. II–Hen. VIII.
Yelv.	Yelverton (King's Bench)	1603–1613

ERRATA.

Page					
55.	N. 6.	*For*	'1 Ir. R. 1'	*read*	'1 Ir. R. 91.'
66.	N. 6.	„	'66a'	„	'664.'
79.	L. 26.	„	'from'	„	'prior to.'
81.	N. 9.	„	'Aston'	„	'Arton.'
82.	N. 4 and 6.	„	'802'	„	'820.'
100.	N. 4.	„	'1889'	„	'1890.'
103.	N. 3. l. 3.	„	'Plowden' (twice)	„	'Dyer.'
113.	N. 1.	„	'Lenson'	„	'Leuson.'
115.	N. 3.	„	'Plowd.'	„	'Dyer.'
116.	Footline 2.	„	'1655'	„	'1632.'
118.	N. 1.	„	'99'	„	'98.'
122.	N. 2 and 5.	„	'1002'	„	'1005.'
126.	N. 3.	„	'3 Atk.'	„	'1 Atk.'
127.	N. 3.	„	'1620'	„	'1626.'
136.	N. 6. l. 7.	„	'1711'	„	'1781.'
181.	N. 3.	„	'405'	„	'485.'
260.	N. 4.	„	'55'	„	'15.'
376.	N. 1.	„	'1683'	„	'1681.'
382.	N. 1.	„	'1680'	„	'1683.'
401.	L. 5 from foot.	„	'only substantial exception to the rule'	„	'important point to remember.'
401.	N. 2.	„	'Padget'	„	'Padgett.'
408.	N. 2.	„	'Mar.'	„	'Mac.'

MODERN LAND LAW.

PART I.

THE NATURE OF INTERESTS IN LAND.

CHAPTER I.

OF CORPOREAL HEREDITAMENTS, AND THE THEORY OF TENURE.

What is the sphere of Land Law?

LAND rights are distinguished from all other rights by the fact that their exercise is circumscribed by conditions of locality. But it does not follow that all rights thus limited in their exercise are the appropriate matter of Land Law. Land is so essential to the existence of all human beings, that every system of law recognizes and protects a formidable list of rights connected with it. The poorest and humblest of Her Majesty's subjects has a right to walk along the high road, unless he is detained in gaol or a lunatic asylum, or some other compulsory harbour of refuge. And, though perhaps it would be strange to say that a man had a right to be in gaol or in a lunatic asylum, yet, if he be an appropriate subject, the State will take care to keep him there, and so to bring him into permanent relationship with a piece of land; for gaols and asylums must stand on the ground. Again, every one, who is decently clad and apparently well-behaved, has a right to enter a public church at proper hours; and the church stands on a piece of land. Nevertheless, these rights do not form part of the subject matter of Land Law,

in the technical sense. They are conferred by Public Law upon all the subjects of the State.

Conversely, many of the numerous duties which are imposed upon individuals and corporations in respect of land, do not fall within the sphere of Land Law. An occupier of land adjoining a highway, who hangs out a lamp or other projection to the danger of the passers-by, is liable, as for a breach of duty, at least if damage ensue[1]. The owner of land must pay the special taxes imposed upon him in respect of it. But these duties and liabilities do not constitute part of the subject matter of Land Law.

Even those rights and duties concerning land, which are created by voluntary act, do not necessarily form part of Land Law. If I trespass upon my neighbour's land, that offence is dealt with under the Law of Torts. If I agree to purchase a piece of land, or if I buy a ticket for a stall at a theatre, my rights in respect of those transactions will be governed by the Law of Contract; and yet they may very well be said to be rights concerning land. What, then, is the appropriate subject matter of Land Law?

Jura in personam.

The useful distinction between *jus in personam* and *jus in rem* will partly help us. A right which can only be enforced against a specific individual or individuals is not the subject of Land Law, in the technical sense. If I agree with the lord of a manor for the exclusive right of selling refreshments on a village common at a particular fair, and a rival tradesman sets up a refreshment stall on the common on the day in question, I may have an action against the lord for his breach of contract. But I have none against my rival, still less against his customers, on the plea that my interest in land has been damaged[2]. Some instances of so-called 'equitable rights,' to be hereafter explained, are on the border line; but, broadly speaking, the rule is good, that a mere *jus in personam* does not amount to an interest in

[1] *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314.
[2] *Hill* v. *Tupper* (1863) 2 H. & C. 121.

land, such as is properly dealt with under the head of Land Law.

Jura in rem.

On the other hand, rights which can be enforced against any one who infringes them, innocently or intentionally, and which have land for their immediate subject matter, are the appropriate sphere of Land Law, and are spoken of as 'interests in land.' They may be of greater or less extent or value, ranging from complete ownership to temporary user of a limited kind; but if they are physically exercised over land, and if they will be protected by Courts of Justice against infringement by strangers, they are interests in land.

Hereditaments.

They are often catalogued under the misleading title of *hereditaments*; and the name is too firmly fixed to be discarded, even though some of these interests never did and many do not now pass, directly or indirectly, to the heir of the owner on his decease.

Real property.

A much better collective title for such interests is *real property*, i. e. interests which can be recovered *re*, or specifically, from those who wrongfully interfere with them. But the term *real property* has, likewise, been used in more than one sense; and the student must, once and for all, be warned against the danger of supposing that the technical terms of Land Law are trustworthy guides to its principles.

What rights concerning land shall be treated as *jura in rem*, and therefore as constituting interests in land, is a matter for any given system of Law to decide for itself; and, in the case of English Law, will appear from the following

Corporeal and Incorporeal Hereditaments.

Hereditaments, then, for we must use the term, fall into two primary classes of Corporeal and Incorporeal. The distinction is an important one, although the explanation usually given of it is absurd. It is said[1] that a corporeal hereditament is a substantial and permanent object, such as land; while an incorporeal hereditament is a 'right issuing out of a thing

[1] e.g. by Blackstone, *Commentaries*, II. chs. 2 and 3; Goodeve, *The Modern Law of Real Property*, 3rd ed., p. 12.

corporate,' such as a right of way. But this is, obviously, an illogical confusion between rights and the subject matter of rights. It cannot be made the basis of a classification of hereditaments, which are themselves rights, or groups of rights, recognized and protected by Law. A little thought will convince us that the Law cannot act *directly* upon any inanimate object, such as land. If we can suppose the whole of our legislative machinery, Crown, Lords, and Commons, to be assembled in view of a piece of land which it is desired to convert from pasture into arable, and solemnly passing a statute to the effect that the field in question shall assume the character desired, we are also bound to believe that the field would display a chilling indifference to the whole proceedings. The only way in which the Legislature could achieve its object would be to order some person or persons to effect the desired change. In other words, Law can only act through human beings; and it is concerned, not directly with land, but with the rights and duties of men and women in respect of land. When, for example, we speak of a conveyance of land, we do not really mean that the land itself is conveyed, but that some interest in it is transferred from *A* to *B*.

True distinction.

The difference between Corporeal and Incorporeal Hereditaments is, in fact, not one of kind, but of degree. It comes to us from a period in the history of Law in which great

Seisin.

store was placed upon possession, or, as it was called, *seisin*, and very little upon any interest which was not accompanied by seisin or possession. It is not quite true to say that this is the peculiar mark of a primitive period; some stages of Law, which we should call primitive, set great store upon mere title, as opposed to possession. But it is true to say that, in what we call the feudal period of Law, possession, and especially possession of land, was worth a great deal more than mere title; and our Land Law is still strongly feudal in character. The feudal idea of property was that of possession guarded by the strong hand; and feudalism

paid very little regard to claims not accompanied by possession, or, as they were called, 'mere rights.' This is the true principle of the distinction between Corporeal and Incorporeal Hereditaments: *the former are those interests which carry possession, the latter those which do not*[1]. On the border line come those interests which do not now confer possession, but which will do so at some future date. Sometimes these are classed as Incorporeal Hereditaments[2], and this is, no doubt, the correct plan. But, as feudal ideas died away, the importance of the distinction was lost; and we now often have future interests treated as Corporeal Hereditaments.

Estates.

The same principle reappears in other phrases. When our present Land Law was assuming definite shape, the interest of the feudal possessor was all in all. It was he who represented the land in its public aspect, who rendered its dues to the State. The terms on which he held it determined his *status*, his *estate*; and it is only a late and lax terminology which confers the title of 'estate' upon any interest which does not carry possession. No doubt, the man who is estated, or possessed, may be estated for a greater or less time. And so we have the estate in fee, or perpetual right of possession, the estate in tail, the estate for life, and so on; till the term 'estate' comes to mark the duration, rather than the scope of the interest. But, none the less is it true, that no interest is entitled, in strictness, to be called an *estate* in land, unless it confers actual possession upon the person in whom it is vested.

In respect of private law, seisin was of equal importance. The feudal possessor was, for the time being, master and controller of the land. Only by slow degrees was his absolute discretion restricted in favour of future claimants. After

[1] Observe how Bracton, a strong feudalist, who has dutifully copied the Roman definition of *Res Incorporales* up to a certain point, swerves at the last moment, and says of them, *quae non possidentur sed quasi*. That is, for him, the decisive test (*De Legibus Angliae*, lib. ii. ch. 12).

[2] e. g. by Mr. Joshua Williams, *Principles of the Law of Real Property*, 17th ed., part ii.

the power of alienation had been conferred on landowners by statute[1], the feudal possessor alone could exercise it by the direct method of investiture, or *livery of seisin*; the claims of a person not in possession might be transferred by deed, but this was a good deal like transferring a lawsuit. Above all, the feudal possessor alone was immediately concerned with the mysteries of *Tenure*, a notion which still lies at the foundation of English Land Law, and which we must now proceed to explain.

Tenure. The doctrine of English Law is, that no subject of the Crown and no foreigner can be solely interested in any piece of land within the limit of the British Empire. It is not, as is sometimes said, that the rights which a man may exercise over a piece of land are different in *kind* from those which he may exercise in respect of a sheep or a watch. It is in their extent, not in their nature, that interests in land differ from interests in chattels. For while it frequently happens that a single individual is exclusively interested in a particular chattel, and so that he may deal with it in any manner not forbidden in the interests of the public; this cannot be the case with regard to land. The individual claiming to exercise rights over land will always find that there is some one else whose interest must be respected; and, although the restriction which such a consideration will place upon his action may be extremely slight in a given case, still it exists, and has legal consequences.

But this is not all. Rival interests in the same subject matter may conceivably be related in different ways. They may arise from independent sources, and be wholly unconnected with one another in point of duration and devolution. Thus, an Act of Parliament may confer upon the owner for the time being of Whiteacre the right to walk across Blackacre, and this right will seriously impede the enjoyment of Blackacre. But it is a right which will be in no way connected with the ownership of Blackacre, in the matter of origin, duration,

[1] 18 Edw. I. (1290) c. 1 (*Quia Emptores*).

or devolution. The two interests will have totally different histories, connected only by the identity of subject matter.

English Land Law, however, requires that every *estate* in land shall be connected with some other estate in the sense of having been *created out of it*. Once created, and the creation may have taken place centuries ago, the estate may be transferred any number of times, if the legal formalities be observed. But the original connexion with what we may call the 'parent estate' will survive, until, in the course of nature or by premature extinction, either estate ceases to exist. If the facts of the original creation cannot be proved, as frequently happens, the derivative estate will be deemed to have been created by the Crown, out of that absolute and plenary ownership which, according to English Law, can exist in the Crown alone in respect of land.

For an explanation of the origin of this remarkable theory, which still colours the whole of English Land Law, the reader is referred to the works dealing with the history of the subject[1]. Its practical consequences, once numerous and important, have by reason of modern legislation almost disappeared. Nevertheless, a failure to bear it in mind is responsible for much of the difficulty experienced by students in grasping the principles of English Land Law; and, even now, the doctrine sometimes leads to practical results. It is responsible, amongst other things, for the peculiar incidents of Escheat, Forfeiture, and Distress.

Escheat.

The principle of Escheat is exceedingly simple, and, given the theory of Tenure, inevitable. *A* grants to *B* an estate in land, creating it out of a larger interest vested in him (*A*). If the estate granted to *B* were expressly confined to a short period, e.g. for seven years, or even for *B*'s lifetime, no one would doubt that, upon its expiration, *A* (or his representative)

[1] e.g. Digby, *An Introduction to the History of the Law of Real Property*, 3rd ed., ch. i. sects. i and ii. The student who really desires to master the subject will pursue his inquiry in the pages of the great French historian, Fustel de Coulanges. See, especially, his *Origines du Système Féodal*, and his *Recherches sur Quelques Problèmes d'Histoire*, Essay I.

would resume possession of the land, by virtue of his greater interest. The same rule holds good if the estate be limited to *B* and his lineal descendants; when these fail, the estate will be at an end, and *A* or his representative will resume possession, by virtue of his still subsisting interest, which, so long as *B*'s estate lasted, was said to be *in reversion*, as distinct from *B*'s estate, which was *in possession*.

On failure of heirs.

But now, let us extend the doctrine, by supposing that the estate of *B* is given for the longest period recognized by our law, viz. in fee simple, or for so long as *B* has any heirs capable of inheriting it. Such an estate cannot be *created* at the present day; for the statute of *Quia Emptores*[1], previously referred to, whilst expressly sanctioning transfers of estates in fee simple, has always been held to prevent their creation *de novo* by any one but the Crown. Accordingly, the relation of tenure set up by the transfer of the fee simple from *A* to *B* will not be a tenure between *A* and *B*, but between *B* and the person of whom *A* 'held,' i. e. the person out of whose estate *A*'s own fee simple was originally created. And when *B*'s estate comes to an end by failure of all his heirs, it is that person, and not *A*, who will be entitled to resume possession, unless *B* or his representative should, as he is perfectly entitled to do, have previously transferred to *C*, in which case it will be the failure of *C*'s heirs which will terminate the estate, and so on. The principle is precisely the same in this case as the others; with the exception that it is not the failure of the heirs of the original donee, but of the last holder, which causes the expiration. It is, perhaps, for this reason that, in such a case, the claimant is said to come in, not *by reversion*, but *by escheat*. In theory, however, his interest has existed all the time, though it has not conferred possession.

Position of the Crown.

But it is a far cry to 1290; and, in the absence of special circumstances of evidence, it is very improbable that any record of the transaction which originally created the estate

[1] 18 Edw. I. (1290) c. 1.

will have survived. And, as no one can make good a claim to land without some evidence, positive or presumptive, of title, it usually happens that the land is claimed by the Crown, in whom, by the doctrine before alluded to, the ultimate reversion is deemed to be vested [1]. The presumption is, that any intermediate owner would have put in a claim, had he been in a position to prove it. And this he may, in fact, do at any time before a peaceful possession of twelve years by the Crown has barred hostile claims by virtue of the Statutes of Limitations.

On corruption of blood.

In addition to the natural case of escheat caused by the death intestate and without legal heirs of the tenant in fee simple, there formerly often occurred what may be termed an artificial escheat, which resulted from the fiction of corruption of blood. When a man had been adjudged to death for felony, or, having taken sanctuary for crime, had abjured the realm, or had been outlawed [2] upon a charge of felony, he lost his estates, and his issue, and even his collateral relations, were deemed incapable of inheriting through him. His estates, therefore, went (subject to the claims of the Crown) to the persons of whom they were 'held.' This artificial escheat was abolished (except in the practically obsolete case of outlawry) by the Forfeiture Act of 1870 [3].

Forfeiture.

The mention of artificial escheat brings us naturally to the closely connected, yet perfectly distinct doctrine of Forfeiture, which is likewise an obvious result of the theory of tenure. Not only did feudal principles require that every estate in land should be deemed to be 'held of' a superior; they demanded that the estate should be liable to destruction upon

[1] This statement only applies to ordinary socage estates. In the cases of copyholds and newly enfranchised socage estates, the lord of the manor can usually establish his claim by escheat.

[2] i. e. declared to be out of the protection of the law, usually for non-appearance to an accusation. A man could not be convicted in his absence.

[3] 33 & 34 Vict. c. 23. § 1. The procedure of outlawry in civil cases was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59. § 3). But it still exists in criminal procedure. (See Statute Law Revision Act, 1888, § 1 (2).)

breach of any of the conditions, tacit or express, upon which it was originally granted. Thus, every feudal estate was originally given upon the condition that the recipient would loyally support the donor, especially in war. This condition was symbolically expressed by the ceremonies of homage and fealty, which bound the recipient to the donor. A breach of this condition involved forfeiture; but as in England, unlike Continental Europe, all military allegiance was due to the Crown alone, the Crown not unnaturally claimed all forfeitures arising from treason against itself. In the early days of English Land Law, it skilfully extended this claim to cover cases of attaint for felony, thereby depriving the convict's lord of his escheat. After a severe struggle, however, the claims of the Crown on felony were compromised for the right to enjoy the land for a year and day, without being accountable for 'Waste,' or depredations. This right of 'year, day, and Waste' was, in practice, usually compounded for by the person who claimed the escheat. But the matter is now of little importance, as the Crown's claim of forfeiture (except in the case of outlawry) was abolished by the Forfeiture Act, 1870[1].

Treason.

Year, day, and waste.

Improper dealings.

Not only did the conviction of crime entail a forfeiture of the offender's estate, but so also did the commission of any other act deemed to be inconsistent with the conditions upon which the estate had been granted, more especially if such act appeared in any way to jeopardize or deny the title of the donor. Thus, for example, the commission of Waste[2], the attempted alienation by feoffment of an interest greater than the estate of the alienor[3], or to a prohibited object, such as an alien or a corporation[4], the fraudulent admission of the title of a hostile

[1] 33 & 34 Vict. c. 23. § 1. Outlawry in civil cases was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59. § 3).

[2] 6 Edw. I. (1278) c. 5. Forfeiture for Waste was indirectly abolished by the abolition of the Writ of Waste (3 & 4 Will. IV. (1833) c. 27. § 36).

[3] Now abolished by the statute which deprives a feoffment of 'tortious' operation (8 & 9 Vict. (1845) c. 106. § 4).

[4] As to aliens, abolished by 33 & 34 Vict. (1870) c. 14. § 2.

claimant[1], all at one time resulted in forfeiture. And forfeitures of this kind were usually, though not invariably, claimable by the original creator of the estate, or his representative. But most of them have become obsolete, and it is made a question by a very learned writer[2], whether a forfeiture can now ever be incurred without a breach of express condition. As will appear, however, in due course, forfeiture can still be incurred by a copyhold tenant, as well as by any tenant who attempts to alienate in defiance of the restrictions contained in the Mortmain and Charitable Uses Acts, and by improper dealings with ecclesiastical benefices. On the other hand, forfeitures even upon breach of express condition have been substantially restricted by recent legislation.

Distress.

Lastly, the peculiar remedy of Distress, which still distinguishes the landlord from all other private creditors, had its direct origin in feudal relationship, and is a common mark of all tenures. The incident enabled the lord, whose services were withheld, to bring pressure to bear upon his tenant by seizing all the goods upon his tenement[3], or, possibly, all the tenant's goods within the lord's jurisdiction; for the incident of Distress was, in early times, closely connected with that jurisdiction which itself had much to do with the developement of Tenure. The lord could not sell the goods; and the tenant could at any time replevy them, by making good his default, or by giving security to abide the event of a decision, if he disputed his lord's right. But the power of levying a Distress survived the disappearance of feudal jurisdiction, and became incident even to tenure by lease for years, a comparatively modern developement. Ultimately too, in the case of Distress *for rent*, the lord acquired the right to sell the

[1] Practically abolished by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74).

[2] Challis, *The Law of Real Property*, 2nd ed., p. 139.

[3] The right of distress against tenants was clearly reserved by the Statute of Marlbridge, 1267 (52 Hen. III. c. 3), which attempted to prohibit other kinds of distress.

goods distrained, and pay himself out of the proceeds[1]; a remedy infinitely superior to the old cumbrous process by which, after lengthy delays, the tenant was outlawed, and his property seized into the lord's hand[2]. But, except in the case of copyholds, the remedy of Distress is now so generally connected in practice with terms of years, that it will be better to reserve further consideration of it till we deal with that subject.

We now proceed to consider the various tenures in detail.

[1] 2 W. & M. (1689) st. I. c. 5. § 2.

[2] Pollock and Maitland, *History of English Law*, i. 335.

CHAPTER II.

TENURE IN SOCAGE.

At the present day there are but three tenures of practical importance in English Law. Tenure by Knight-service, the original and most characteristic of all tenures, was expressly abolished by the Restoration Parliament of 1660[1]. Its features survive only in the more modern tenures which have borrowed from it. Tenure by Divine Service, or in Frankalmoigne, though not obsolete, is practically confined to the ancient endowments of ecclesiastical corporations; it is very doubtful whether it would be held to apply to any lands acquired by such corporations in modern times, even though a licence for such acquisition had been duly obtained. The chief feature of this tenure, that it imposed no duties upon the tenant other than those of a spiritual character, rendered it exceedingly valuable in the days in which the amount of a man's liabilities to the State depended largely upon the extent of his land. But, under modern conditions of citizenship, this feature has ceased to be of importance; and a discussion of the subject would have no practical value. The peculiarities of corporate ownership of land arise, not from the nature of tenure, but from the special nature of corporations, and will be dealt with at a later stage.

Knight-service.

Frankalmoigne.

[1] 12 Car. II. c. 24. § 1 (5). The abolition operated as from Feb. 24, 1646, the date of the passing of a similar Act by the Long Parliament during the Civil War.

tenure.

There remain the three tenures of Socage, Copyhold, and Leasehold. And of these we will first deal with Socage, or, as it is often called, Freehold [1].

Tenure in Socage probably represents an attempt on the part of the framers of English Land Law to reconcile the theory of tenure with economic conditions which they did not seriously wish to disturb, but which they desired to express in feudal terms. During the later Middle Ages, the institution of great landed properties, in the hands of single owners, was gradually gaining at the expense of the older institution of communal villages, in which a number of farmers held small undivided shares in common fields. With a scanty population to draw upon, the great landowners had found themselves compelled, under one pretext or another, to exact labour services from the farmers of neighbouring villages, in order to get their domains cultivated. As these farmers were often fairly substantial persons, the amount of services which could be exacted from them was rigidly fixed by custom, which, in this case, no doubt originated in some compact. From the fact that the 'service' of the socager is generally connected, in the Middle Ages, with his 'suit' to the great landowner's court, we may draw the inference that the landowner originally established his claim by virtue of his public position as the State's local official, endowed by the State with certain powers in return for public services. Be this as it may, it is fairly clear that the feudal lawyers who gradually established the principles of English Land Law, chose to express this arrangement by saying that the farmer 'held' his land 'of' the great landowner, on render of suit and service. Sometimes the entire village would owe suit and service to one great landowner; in which case the domain of the latter and the common lands of the village would unite to form this typical land unit

Suit and Service.

[1] Until the abolition of tenure by knight-service, the term 'freehold' would not, of course, have distinguished socage from military tenure. The latter was, *par excellence*, 'free' tenure.

of the later Middle Ages, known as the Manor [1]. In other cases, the different farmers would owe suit and service to different landowners; and so the socager of later times is not by any means always the member of a manorial group. Sometimes, again, the socager was a genuine *tenant* of the land of his lord, i. e. the latter had actually granted to him a portion of his domain in return for fixed agricultural service. Ultimately, historical origins were lost, and socage tenure became merely a generalization for a number of arrangements by virtue of which land was held. Gradually the features of the arrangement, in many respects imitated, as has been said, from the genuine tenure by knight-service, became stereotyped into the following incidents :— The Manor.

1. *Fealty*. The fundamental duty of the tenant, to support his lord in all his lawful undertakings, was expressed by the oath of fealty, which can, in theory, still be demanded from every socage tenant. It was not so strict as the military oath of *Homage*, by which the tenant actually became 'the man' of his lord [2]; but it implied a general promise to maintain the lord's interest. It must, however, be remembered that it could only be demanded by the creator, not by the mere transferor of a socage estate. In early times, no doubt, breach of fealty involved a forfeiture. It would be difficult to specify any act which at the present day would work a forfeiture on that ground; unless it were the refusal of the oath of fealty itself [3]. Fealty.

[1] The author must not be understood to suggest that every manor comprised, in the later Middle Ages, an absorbed township. But it seems probable that the manors which did not do so were more or less imperfect in character. This is not, however, a book on history.

[2] *Devenio vester homo.* Express saving was made of the duty which the tenant owed to the king. For the form of the oath of homage, see Co. Litt. 64 a. A curious note in Hargrave's and Butler's edition mentions that the ceremony of kissing, a part of the ceremonial of homage, was, by virtue of an Act of Parliament (18 Hen. VI. No. 58), omitted during the Plague in cases in which the king was a party. Homage was occasionally rendered by socage tenants (Co. Litt. 85 a). It was abolished by 12 Car. II. (1660) c. 24.

[3] For the form of the oath of fealty, see Co. Litt. 67 b.

Service.

2. *Service.* It was likewise an essential feature of the doctrine of tenure, that the tenant should make some constant return to his lord for the estate conferred upon him. As we have said, 'suit and service' was the normal expression. But, as the claims of feudal tribunals were gradually reduced by the Crown, and as the military landowner ceased to repair to the king's army with his 'suit' or following, the first branch of the expression tended to become meaningless, at least for socagers[1]. The services were at first rendered in kind; but, with the increased supply of coin and purchaseable labour, the practice grew up of commuting the personal service into money payment. There was the less difficulty in this, that the service of the socager was, on the one hand, non-military, and, on the other, according to a doctrine early established, of fixed quantity[2]. The superior convenience, both to lord and tenant, of the payment in money led to its general adoption about the end of the thirteenth century[3]; and although, at the time of the Great Plague, the scarcity of labour made the great landowners anxious to return to the system of service in kind, they were, on the whole, unsuccessful in the attempt, at least so far as socagers were concerned.

Adaeratio.

Fall in the value of money.

This failure was of more than temporary inconvenience to the great landowners. For while the value of labour, as compared with that of other necessaries, has substantially risen since the thirteenth century, the value of money has steadily and substantially fallen. So that the money payment which, in the thirteenth century, represented a fair equivalent for two days' labour a week throughout the year, has long been considered too trifling to be collected, and has, in the vast majority of cases, fallen into abeyance. The

[1] Of course, where the socage estate is held of the lord of a manor, the 'suit' is a genuine liability.

[2] Co. Litt. 85 b.

[3] Littleton (§ 119), however, expressly says that 'in divers places the tenants yet do such services with their ploughs to their lords.' And we have no right to suppose that such a statement is mere legal fiction.

result has been, not merely a direct pecuniary loss to those legally entitled to claim it, but the still more serious consequence that their titles have been lost for want of that evidence which the regular receipt of rent would have so admirably supplied. This is the chief reason why the Crown reaps the benefit of the greater number of the escheats which occur. But there is no reason why a rent should not be reserved on the creation of a socage estate; and, in point of fact, socage rents are occasionally met with [1]. Such rents certain as were incident to any of the tenures abolished by the Act of 1660 are expressly reserved by that Act; and are, accordingly, now incident to the socage tenure into which such abolished tenures were converted [2]. Consequences.

3. *Reliefs* were also a curious adoption from military tenure. There can be little doubt that, in the latter, estates for life were for a long time the greatest interests recognized. But the natural forces which always make for heredity gradually established the rule that a lord, when applied to by the heir of his deceased tenant for a continuance of his ancestor's estate, should not refuse the request, at least in suitable cases. As an equivalent, however, for the favour, the heir paid a sum, varying with the value of the land in question, by way of *Relief*. This practice was extended, without any historical justification, to the lands of socagers; and the custumal which, in the statute book, poses as the Statute of Wards and Reliefs [3], states that the free sokeman 'shall double his Rent after the death of his Ancestor,' as an equivalent of the knightly Relief. The close connection between rent and Relief is shown by the fact that the lord may distrain for the latter, as well as for the former [4]. Reliefs.

[1] The tenement referred to in the case of *De Beauvoir* v. *Owen* (1850) (5 Exch. 166, and 16 M. & W. 547), as being held of the manor of Stratfield Mortimer 'by fealty and the rent of nine shillings yearly,' was a socage tenement.

[2] 12 Car. II. (1660) c. 24. § 5.

[3] 28 Edw. I. (1300) st. I. (4). The date is really uncertain.

[4] Co. Litt. 91 a. Coke (ib. 91 b) was of opinion that if service were in kind, no relief could be claimed on the tenant's death.

Heriots.

4. *Heriots.* Clearly distinguishable from Reliefs, yet often confused with them, is the right of the lord, on the death of his tenant, to seize his best chattel. This incident is really far more appropriate to military and to copyhold tenures, than to socage. In the first case, it is said to owe its origin to the practice adopted by great landowners of furnishing their tenants with armour, to be returned upon the tenants' death. The seizure of the heriot in these circumstances may originally have been a genuine attempt to recover the armour, which afterwards degenerated into an illogical tax. In the case of copyholds, the incident is said to mark the originally servile character of the tenant, whose lord seized one of his chattels, in token of his right to claim them all. But the incident is occasionally found in socage tenure; and, where it can be proved to have existed as a custom from time immemorial, it may be enforced [1]. Apparently, the property in the heriot vests in the landlord from the moment at which he indicates his choice [2]. There is another kind of heriot, claimable under express reservation, and known as 'heriot service.' It seems that this can be distrained for in the ordinary way, as rent [3]; but the customary heriot can only be seized [4].

Heriot custom.

Heriot service.

Wardship.

5. *Wardship.* The custody of infant heirs was one of the most valuable privileges of the lord in the case of military tenures; and, though no principle demanded its extension to socage, the natural tendency of legal systems towards uniformity effected this result. But wardship in socage is a very different thing from wardship in chivalry. In the first place, it does not belong to the lord, but to the next of kin who, as not being of the blood of the ancestor through

Not to the lord.

Lord Zouche v. *Dalbiac* (1875) L. R. 10 Exch. 172.

[2] Viner's *Abridgment*, sub tit. *Heriot* (E) 1.

[3] ib. (E) 4. The point appears to be, that heriot service must be claimed during the continuance of the estate in respect of which it is payable (except where attached to a fee simple before *Quia Emptores*). A recent case of heriot service was mentioned in *Williams* v. *Burrell* (1845) 1 C. B. 402. But the validity of the reservation was not discussed.

[4] *Woodland* v. *Mantel* (1552), Plowden, p. 94.

whom the heir claims the land, can never inherit it, and who, therefore, is under no temptation to hasten his own claim by getting rid of his ward. As the custumal formerly referred to says—'The ward of an heir that holdeth in Socage, if the Land or Inheritance descend of his Mother's side, then it belongeth to the next Friend on the Father's side, and contrariwise[1].' Again, the infancy of the heir in socage only lasts till he attains fourteen, whereas that of the heir in chivalry did not cease till he was twenty-one[2]. Finally, the guardian in socage is strictly accountable for his management of the land, and can take no profit for himself[3]; whereas, subject to a provision for the infant heir, and to certain restrictions upon Waste[4], the guardian in chivalry might make his profit of the land.

Only till fourteen.

Fiduciary.

But the importance of wardship in socage has been greatly diminished by two statutory provisions. The Act which abolished Military Tenures in 1660 authorized the father of any unmarried child to dispose of the custody after his death of such child, until it should attain twenty-one[5]. Such disposition may be effected by deed or Will executed with due formalities, and carries with it the right to the administration of the ward's lands, to the exclusion of the guardian in socage. Again, the recent Guardianship of Infants Act, 1886, appoints the mother of an infant who survives its father, guardian of the infant[6], either alone or conjointly with any guardian appointed by the father. A woman may also appoint by deed or Will guardians of her unmarried children, to act after her own death and that of their father, either solely or in conjunction with those appointed by the

Specially appointed guardians.

[1] 28 Edw. I. (1300) st. I. (7). [2] Co. Litt. 87 b.

[3] ib. founded on Statute of Marlbridge, 1267 (52 Hen. III), c. 17.

[4] e. g. in *Magna Carta*, 9 Hen. III. (1225) c. 4, and Stat. West. I. (1275) c. 21.

[5] 12 Car. II. (1660) c. 24. § 8. The powers of the section are conferred upon fathers who are themselves under the age of twenty-one; but this provision was, so far as appointments *by will* are concerned, repealed by the Wills Act of 1837 (7 Will. IV & 1 Vict. c. 26. § 7).

[6] Apparently, whether it is married or not (49 & 50 Vict. c. 27. § 2).

father; and may even provisionally nominate guardians to act in conjunction with the father, in case the Court should be of opinion that he is unfit to act alone [1]. Although the father's powers under the Act of 1660 can only be exercised in the case of unmarried children, it seems clear that the marriage of such children, after the father's death but before attaining majority, will not terminate the guardianship [2]; and, doubtless, the same rule would be held to apply to the mother's appointments. Her guardians, if duly entitled to act, have all the powers of those appointed by the father under the Act of 1660 [3].

Guardianship in socage is, then, confined to cases in which an infant heir (under the age of fourteen) has no parents living, and no guardian appointed by either of them. In such an event, however, it is presumed that, antiquated as the institution may appear, the guardianship in socage would devolve on the next of kin incapable of inheriting. If he dies, however, before the ward attains fourteen, the guardianship does not pass to his executors, nor can he dispose of it; it is an office which belongs to the next of kin of the infant [4]. If the infant is entitled to two socage estates, coming to him by different lines of descent, it was the opinion of Coke that these estates should be administered by the different next of kin of the infant, each side taking that which he could not inherit; while the custody of the heir would go to the first of the guardians who seized him [5]. It must be remembered that guardianship in socage arises only

[1] 49 & 50 Vict. (1886) c. 27. §§ 2 and 3. For a case in which the powers conferred by the Act have been applied, see *In re G*— (1892, 1 Ch. 292).

[2] *Eyre* v. *The Countess of Shaftesbury* (1722) 2 P. W. at p. 109. There has been a doubt whether the marriage of a female ward will not terminate the guardianship.

[3] 49 & 50 Vict. (1886) c. 27. § 4.

[4] Co. Litt. 90 a. Littleton went so far as to say that the executors of a deceased guardian in socage could not be made liable for their testator's misappropriations, as the Writ of Account did not lie against executors. But the Writ of Account has long since been superseded by equitable remedies; and it is highly improbable that such an argument would prevail at the present day.

[5] ib. 88.

on descent; an infant devisee or purchaser of a socage estate has, as such, no guardian in socage [1]. On the other hand, a guardian in socage has the administration of incorporeal hereditaments belonging to his ward, although these are not the subjects of tenure, and cannot, therefore, of themselves confer guardianship [2].

Dower. 6. *Dower and Curtesy.* The former of these two incidents entitled the widow at common law to a life interest in one-third of the socage lands of which her husband was at any time during the marriage solely seised, or to which he was entitled in possession, for an estate of inheritance, i. e. in fee simple or fee tail, provided only that any children which she might have borne to him would have been capable of inheriting such estate in default of alienation. The incident of Curtesy entitled the husband of a female tenant in socage to a life interest in the whole of the lands of inheritance of which she was actually seised, from the time that issue capable of inheriting was borne by her to him. These incidents, which have been greatly modified by recent legislation, will be discussed when we come to deal with interests in land acquired by marriage [3].

Curtesy.

Abolished incidents. Other incidents of socage tenure were abolished by the Act of 1660 [4]. Of these may be mentioned:—

Aids. 7. *Aids*, which embodied the general duty of supporting one's lord in the concrete form of money payments. At first uncertain, then stereotyped by custom, these payments were finally fixed by statute, both as to occasion and amount, at the 'three reasonable aids.' They were payable (*a*) whenever the lord was captured in war, to provide his ransom, (*b*) to contribute towards the expenses of knighting his eldest son, (*c*) to furnish a marriage portion for the first marriage

[1] *Quadring* v. *Downs* (1677) 2 Mod. 176.

[2] Co. Litt. 87 b. If the infant inherits incorporeal hereditaments only, he may choose his own guardian. If, however, he is too young to do so, Coke thought it 'most fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him.' ib.

[3] Post, cap. xvi.

[4] 12 Car. II. c. 24.

of his eldest daughter[1]. The amount which the tenant might have been called upon to pay under the first head seems to have remained uncertain; the two latter claims were satisfied by a payment of a shilling for every pound value of the land[2]. Curiously enough, the Act of 1660, while it expressly abolishes the two latter aids, makes no mention of the first[3]; but it is hardly probable that a claim to an aid for the ransom of the lord's body would receive serious attention at the present day.

Primer Seisins and Fines on Alienation.

8. *Primer Seisins* and *Fines on Alienation*, both abolished by the Act of 1660[4], only applied to those socage estates which were held directly of the king, 'without mean.' Primer seisin was the king's right in such cases to one year's value of the land which descended to the heir of his deceased tenant[5]. Fines on alienation were payments demanded for licence to alienate lands held of the king, as against whom the statute *Quia Emptores* did not hold[6]. Tenure *in capite* itself was abolished, as a special form of socage, by the Act of 1660[7]; but a socage estate can, of course, be held directly from the Crown at the present day. Vast quantities of such socage estates have been created in the Colonies during the last century.

Special forms of socage.

So far, we have assumed that every instance of socage tenure is that known as 'free and common socage,' i. e. socage distinguished, on the one hand, from base or villein socage, of which we shall have to speak later on, and, on the other, from those few special varieties which are recognized by the law, and which we may now enumerate.

Serjeanty.

1. *Serjeanty*, which occurs only in the case of estates held directly of the Crown, in which the service to be rendered by the tenant consists in some personal, but honourable act[8].

[1] *Magna Carta* (1215) cc. 12, 15.
[2] 3 Edw. I. (1275) c. 36 (West. I.); 25 Edw. III. (1350) st. V. c. 11.
[3] 12 Car II. (1660) c. 24. § 1. [4] ib. [5] Co. Litt. 77 a.
[6] Originally, alienation without such licence would, of course, have worked a forfeiture. This rule was altered by 1 Edw. III. (1327) st. II. c. 12.
[7] 12 Car. II. (1660) c. 24. § 1 (5). [8] Co. Litt. 108 b.

Formerly Serjeanty was of two kinds, viz. Grand Serjeanty, a special form of military tenure [1], which implied the rendering of some important ceremonial service, and Petit Serjeanty, where the service to be rendered was that of supplying some small article, presumably for the royal use [2]. The honorary services of Grand Serjeanty are expressly reserved by the Act which abolished military tenures [3]; and it is presumed that the only way by which these illogical provisions can be reconciled is by treating Grand Serjeanty as a special variety of socage. Estates conferred by the Crown in recognition of distinguished public services are generally held by Petit Serjeanty.

Gavelkind.

2. *Gavelkind.* It is perhaps hardly correct to speak of Gavelkind as a tenure; it is rather a local custom which affects certain lands, whether held by socage or copyhold tenure. The custom is recognized officially by the Courts; which will presume its application to all lands within the county of Kent, and allow it to be proved in any other case by the party asserting its existence. Where the custom is presumed or proved to exist, it varies the common law in the following particulars, which, though they might more logically be explained under various heads, it will be convenient to state here once for all.

No primogeniture.

(*a*) *Estates of inheritance descend to all the males in the same degree equally.* In other words, the common law rule of primogeniture is excluded. This peculiarity is recognized by the so-called statute *De Praerogativa Regis*, a custumal of the fourteenth century [4].

Curtesy and Dower.

(*b*) *The surviving husband or wife takes a life interest in a moiety of the lands of the deceased spouse, by way of Curtesy or Dower, but subject to forfeiture on remarriage, or, in the case of the widow, incontinency* [5]. This is quite different from the rules of the common law, as will hereafter appear.

[1] Co. Litt. 105 b. [2] ib. 108 a.

[3] 12 Car. II. (1660) c. 24. § 7 (3). [4] Printed as 17 Edw. II. (c. 17).

[5] See the case of *Stoe* v. *De Thirling* of 21 Edw. I, quoted in Robinson on Gavelkind (5th ed.), 133, and *De Praerogativa Regis* (17 Edw. II.) c. 16 (6). It

Infant's alienation.

(c) *An infant can alienate by feoffment at the age of fifteen*[1]. At the common law, an infant cannot make a binding conveyance of land except under special circumstances.

These are the only peculiarities of gavelkind which at the present day are of practical importance. But two other rules formerly distinguished lands subject to the custom of gavelkind:—

No escheat for felony.

(d) *They did not escheat for felony, though they were liable to forfeiture for treason and felony*[2]. In the latter case, the lands went to the felon's heirs, subject to the Crown's 'year, day, and Waste.' Presumably, the rule would still apply to the case of outlawry on a criminal charge.

Early power of testation.

(e) *Gavelkind lands were devisable before the Statute of Wills.* Though the existence of this rule has been doubted, it must be taken to have been decisively affirmed, at least for legal purposes, by the great case of *Launder* v. *Brooks*, tried in the King's Bench in 1639[3].

It seems the better opinion that, although the Court will take judicial notice of the custom of gavelkind, and of the peculiarities of the rule of descent, a litigant relying on any other gavelkind rule must make express mention of it in his pleadings[4].

Burgage.

3. *Burgage* or *Borough English*, a peculiar custom of descent affecting lands in certain ancient boroughs. The name 'Burgage' is applied by Littleton to a whole variety of socage tenure[5]; but it is now usually confined to the special rule by which such lands descend to the youngest son, or even collateral heir, of a deceased tenant. It is found also in copyhold tenure. Like all other special customs, its existence must be proved by the party relying upon it. Other

appears to be settled, though at one time it was doubtful, that the birth of issue is not essential to a husband's claim for Curtesy in gavelkind.

[1] This rule was recognized in the recent case of *Maskell's and Goldfinch's Contract* (1895, 2 Ch. at p. 528). But the same case shows that the Courts are somewhat reluctant to act upon it.

[2] *De Prærogativa Regis* (17 Edw. II.) c. 16 (4).

[3] Cro. Car. 561.

[4] ib. 562a.

[5] Co. Litt. 108 b.

customs are enumerated by Littleton as frequently found in ancient boroughs[1]; but there is no 'burgage tenure' of which the Courts will take judicial notice. When validity is given to such local rules, it is by virtue of the general principle that a custom, if it fulfil certain requirements, is entitled to recognition by the Courts[2].

[1] Co. Litt. 108 b–116 a.

[2] For the qualities essential to the support of a custom, see Blackstone, *Comm.* (4th ed.) I. pp. 74–79.

CHAPTER III.

ESTATES IN SOCAGE. THE ESTATE IN FEE SIMPLE AND THE ESTATE TAIL.

An *estate* in lands.

By the terms of his tenure is settled the *character* of a man's legal interest in land. But it is necessary also to ascertain, in any given case, the *amount* of his interest.

Duration.

The best guide to the amount of a man's interest in land is the duration of that interest. If it be an interest which may endure for an incalculable period, the rights comprised in it will be very extensive, since it is unlikely that the exercise of them will prejudice subsequent interests in the same land. If the interest be liable to be terminated by a remote, but not impossible contingency, such as the failure of issue, the rights comprised in the interest will be proportionately restricted. If, finally, the interest be calculated to endure for a comparatively short period, the beneficial rights comprised in it will be few; for the exercise of extensive rights would be likely to prejudice the interests of future owners. It must be remembered that, in this connection, no account is taken of restrictions imposed in the interests of the community at large. These, as has been said, are not a matter of Land Law, but of Public Law.

The three degrees of duration to which allusion has been made are known to English Land Law as the Estate in Fee Simple, the Estate Tail, and the Estate for Life respectively. Of these in their order, beginning with the greatest.

Estate in Fee Simple.

The Estate in Fee Simple may be described as the historical

outcome of a series of encroachments on the original principles of tenure. There can be little doubt that the earliest tenancies were of a temporary and precarious character, the tenant holding at the will of the landowner, who allowed him to use a portion of his land. The purely economic relationship of owner and occupier soon, however, became intimately connected with the personal relationship of lord and man, which was a relationship for life, or at least until one of the parties violated the terms of the compact. Thus the typical estate became an estate for the life of the tenant, or, perhaps, for the joint lives of the lord and his man. Gradually, the practice of allowing the issue of a deceased tenant to succeed to the estate of their ancestor grew up, and produced the inheritable fee; collateral heirs being subsequently recognized. Finally, the power of alienation, definitely guaranteed by statute in the year 1290[1], completed the character of the Estate in Fee Simple of the present day.

Definition.

The modern Estate in Fee Simple, then, may be defined as that interest in socage tenure which can be freely alienated by its owner during his life, and which will, on his death, if left undisposed of by him, descend beneficially[2] to the next heir or heirs, lineal or collateral, and however remote in degree, of the last purchaser. It is evident that the statute *Quia Emptores*[3] indefinitely extended the inheritable qualities of a fee simple, by making it descendible, not merely to the heirs of the original tenant, but to the heirs of the tenant for the time being. So that it can, in fact, never come to an end except by the total failure of heirs of the last holder, when it will go by escheat to the representative of the original creator, if he can be found[4].

[1] 18 Edw. I. c. 1 (*Quia Emptores*).

[2] The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), makes an important alteration in the form of descent. It does not, however, change the beneficial descent of the Estate in Fee Simple. (See post, cap. xii).

[3] 18 Edw. I. (1290) c. 1.

[4] The technical differences between the 'purchaser' and the existing tenant will be explained in the chapter (No. xii) on *Inheritance*.

Rights of the tenant in fee simple.

Such an estate is manifestly capable of subsisting as long as the system of law which recognizes it; and the tenant in fee simple is, as has been said, not restricted in his treatment of the land by any consideration for subsequent interests. If he or his predecessors in title have created or suffered the establishment of any minor interests derogatory to their powers, he is, of course, bound to respect such interests. For example, if a tenant in fee simple have granted to a neighbour a right of way over his (the grantor's) land, neither he nor any heir of his nor purchaser from him may, so long as the right of way exists, do any act which obstructs the exercise of it. But, subject to such considerations, the tenant in fee simple may use and dispose of the land in any manner that he pleases. He may alter the course of husbandry, convert pasture into building lots, open and work mines, fell timber, dig lakes, pull down or erect buildings, and, in fact, let the land go to ruin or keep it in a state of efficiency, just as he pleases. Or again, he may dispose of it completely or partially, for any length of time, and on any terms he may choose; except that (*a*) he cannot directly create another estate in fee simple in it, such a course being prohibited by the statute *Quia Emptores*[1], and (*b*) he cannot create any interest to be held by terms of copyhold tenure, save in special circumstances[2]. It might, indeed, appear that the claim of the Crown to mines of precious metals, reasserted with success in the recent case of *The Attorney-General* v. *Morgan*[3], was based upon a restriction of the rights of a tenant in fee simple. But a study of the arguments employed in that case, and in the great *Case of Mines*, reported by Plowden[4], will show that the right of the Crown is based on prerogative, not on the

[1] 18 Edw. I. (1290) c. 1. [If there are any services due for the land, they are to be rendered by the alienee, and to be apportioned if part only of the land is transferred (c. 2).]

[2] The Copyhold Act, 1894 (57 & 58 Vict. c. 46. § 81). And even if such an interest be lawfully created, it at once becomes vested in the grantee 'as in free and common socage.' This is one of the very few cases in which a new fee simple can be created at the present day.

[3] 1891, 1 Ch. 432.

[4] *Comm.* 310 (ann. 1568).

ordinary principles of tenure. Where a fee simple is liable to be put an end to by the happening of a contingency, as in the case of a fee simple subject to an executory devise over, the tenant may be restrained from committing unreasonable or, as it is oddly called, 'equitable' Waste[1]. But we are here dealing only with the ordinary case of the fee simple absolute.

Method of alienation.

It remains to be said of the fee simple, that it can be transferred only by solemn deed *inter vivos*, accompanied by what are known as 'words of inheritance,' or by last Will duly executed. The classical form of the words of inheritance is 'and his heirs,' following the name of the transferee. Thus, a limitation 'to *X* and his heirs,' in an appropriate instrument, gives *X* a fee simple. By the express provisions of the Conveyancing Act, 1881[2], a similar limitation to *X* 'in fee simple' will have the like effect; but this, it would seem, is the only permissible alternative of the old classical form, so far as deeds are concerned. It has, however, long been the rule that, in the construction of Wills, any expression which appears to indicate the testator's intention to devise a fee simple will be held to have that effect; and this rule has received statutory recognition in the Wills Act of 1837[3]. It need, however, hardly be pointed out that, even in a Will, it is always better for a professional draftsman to use correct terms of art, as to the meaning of which there can be no dispute, than to trust to the chance of a court of justice putting the right construction upon the words of a man who can no longer be consulted as to his intentions.

Estate Tail.

Next in point of duration to the estate in fee simple, is the estate in fee tail, which depends for its main characteristics on the statute *De Donis Conditionalibus*, passed in the year 1285[4]. From the preamble of the statute, we learn that there had been a dispute concerning the proper construction to be put upon

De Donis.

[1] *Turner* v. *Wright* (1860) 2 De Gex, F. & J. 234.
[2] 44 & 45 Vict. c. 41. § 51.
[3] 7 Will. IV. & 1 Vict. c. 26. § 28.
[4] 13 Edw. I. st. I. c. 1.

The difficulty.

certain forms of expression used by the conveyancers of the thirteenth century. For example, if an estate were given to a man and his wife *et heredibus de ipsis viro et muliere procreatis*, it was claimed that the donees, immediately on the birth of issue, might treat it as a fee simple absolute, and alienate it accordingly, to the prejudice, not only of the donor, but of the expectant issue. And this claim was asserted, even though the express condition were added by the instrument of creation, that if the donees should die without heirs of their bodies begotten, the land should revert to the donor or his heir. A similar claim was asserted, and, apparently, with equal success, if the gift had been originally to *A et heredibus de corpore suo exeuntibus*. Upon the birth of issue, *A* would treat the estate as a fee simple absolute, regardless of the contingency that his issue might die in his lifetime. This explanation is interesting, as showing that the power to alienate estates in fee simple was exercised in practice before its express confirmation by the statute *Quia Emptores*[1]; and also as showing that the Courts had already began to treat the word 'heirs' as indicating merely the extent of the estate taken by the donee, not as conferring any specific interest on the person who might happen to be the donee's heir. To use a modern expression, the word 'heirs' was already treated as a word of limitation, not as a word of purchase. And this construction was not so unreasonable as might at first sight appear, even in the days when Wills of land were not recognized. For we must remember that, until a man is dead, it never can be certain who will be his heir—*nemo est haeres viventis*. And it was abhorrent to all feudal principles that an estate should be conferred upon an unascertained person.

The remedy.

But, however reasonable such a construction might in itself be, it was very unpopular with the great landowners who had created many of these estates, and who saw their chances of reversions diminish by its adoption. And so, joining their interests to those of the expectant heirs, they procured the

[1] 18 Edw. I. (1290) c. 1.

passing of the famous statute *De Donis Conditionalibus*[1], by which it was, in effect, enacted, that the donee of such estates should have no power to aliene as against either his issue or the donor; but that, on his decease his issue, and upon failure of these the donor or the donor's heir, should take the land *per formam doni*, notwithstanding any attempted alienation by the donee. The statute did not, in theory, convert the estate of the donee into a mere life estate; for his alienations in fee were only made voidable, not void, and could only be defeated by the active interference of the issue or reversioner claiming under the statute[2]. The tenant in tail is, in fact, a tenant in fee with limited powers; and it is, no doubt, a recognition of this fact which has conferred upon his estate the name of *feodum talliatum* or 'fee tail,' i. e. fee cut down or reduced.

The statute *De Donis*.

The two examples quoted by the statute *De Donis* do not, in fact, exhaust all the varieties of estates tail, which, for practical purposes, may be described as four, viz.:—

Species of estates tail.

(i) *The estate in tail general*, one of the examples quoted, which arises where land is limited 'to *A* and the heirs of his body,' or, in deeds executed since the commencement of the Conveyancing Act, 1881, 'to *A* in tail,' or, in a Will, 'to *A* and his issue,' or other analogous expressions[3]. Such an estate is descendible to all the issue of the donee in accordance with the ordinary canons of inheritance; but it cannot descend to his collateral heirs.

Tail general.

(ii) *The estate in tail male (or female) general*, which is limited in precisely the same way as the last, except that the qualification of sex is introduced—e. g. 'to *A* and the heirs male of his body,' or 'to *A* in tail male' (by the Convey-

Tail male (or female) general.

[1] 13 Edw. I. (1285) st. I. c. 1. [2] Co. Litt. 336 b.

[3] There is authority for saying that, if the intention to create an estate tail be clear from the context, the so-called 'words of procreation' need not be expressed, even in a deed. A limitation by deed to *A*, son of *B*, and to the heirs males of *A*, has been held to confer an estate in tail male. *Beresford's* Case (1607) 7 Rep. 41. But such a limitation would involve great risk. In the absence of clear context, a limitation 'to *A* and his heirs male' would confer an estate in fee simple descendible to all heirs of either sex.

ancing Act, 1881). Such an estate is descendible to all the issue of the donee, being of the specified sex, according to the ordinary canons of inheritance [1].

Tail special.

(iii) *The estate in tail special,* which is limited to the issue, not of one, but of two persons, who must, of course, be of different sexes and capable of lawful marriage. A limitation 'to *A* and the heirs of his body by *M*,' or, 'to *M* and the heirs of her body by *A*,' are typical examples. In such cases, only the issue of the two persons named can inherit; and, of course, they inherit as heirs of the person to whom the estate is first limited. In the case of a devise, any language clearly signifying a similar intention will suffice. But there appears to be no statutory method of shortening the expression.

The limitation may be in the first instance to two or more persons and their issue, e. g. 'to *A* and *M* and to the heirs of their bodies.' Here the effect of the limitation will depend upon whether *A* and *M* are capable of intermarriage, as being of different sexes and not within the prohibited degrees. If so, whether they are at present married or not, they will take a joint estate tail, descendible only to their joint issue. If they are not so capable, they will take a joint estate for the life of the survivor, with remainder to the lineal heirs of each of them in equal undivided shares, as tenants in common [2].

As no limitation can be made in favour of the issue of an unspecified person, it follows that an estate in tail special must always become an estate in tail general after the first descent [3].

[1] Limitations in tail female are, in practice, almost unknown; and it has even been suggested that they would be invalid. But there seems to be no good ground for such a suggestion. In a recent case, Lord Blackburn expressly (but unnecessarily) said, that a limitation to heirs female of the body would be valid. *Earl of Zetland* v. *Lord Advocate* (1878) L. R. 5 App. Ca. p. 523.

[2] Co. Litt. 182 a. The practical result of this rule will appear, when we discuss estates held in community (cap. x).

[3] For if it be uncertain who will be the heir of the donee, *à fortiori* is it uncertain who will be that heir's wife.

(iv) *The estate in tail male (or female) special.* This case differs from the last solely in restricting the inheritance to the issue of a specified sex. It is created by a limitation to the donee 'and the heirs male of his body by his wife *M*,' or, in a Will, by equivalent expressions. There is no statutory abbreviation. The rules for joint gifts in tail male (or female) special are similar to those just described for gifts in tail special not limited to a particular sex. Tail male (or female) special.

A peculiar instance, now almost obsolete, of the estate in tail special, occurred when a gift was made to a man by one of his wife's relatives, to hold 'in frankmarriage.' The estate could only be held of the donor; and, therefore, if the donor at the same time enfeoffed a stranger in remainder expectant on the determination of the donee's estate, the latter was merely an estate for life, unless words of inheritance were expressly used. If, however, the donor did not part with the remainder, the donee and his wife became, without any words of inheritance, tenants in tail special, with descent only to their joint issue. Another peculiarity of the estate was, that no service was due from the donee or his issue in respect of the estate, until the fourth descent was reached. Moreover, if the marriage were subsequently dissolved, the estate would go exclusively to the party from whose side it came; and his or her relations would likewise have the guardianship of the infant heir, contrary to the usual rule [1]. The case of Frankmarriage is expressly noticed and included in the cases to which the statute *De Donis* applies [2]. Frank-marriage.

For some time the restriction placed by the last-mentioned statute upon the alienation of estates tail seems to have been effectual. Open and direct alienation was, of course, impossible, in the face of the statute; and the framers of the statute had, with great forethought, provided that the method of alienating lands by fictitious lawsuit, known as a Fine [3], Evasion of the statute *De Donis*. The Fine.

[1] Co. Litt. 21 a–22 a. [2] 13 Edw. I. (1285) c. 1 (2).

[3] A Fine was an action for the recovery of land compromised, or put an end to, by the defendant's acknowledgement of the plaintiff's title. The

should not be used to defeat their objects. But the growing desire to secure freedom of alienation, aided by the ingenuity of conveyancers, ultimately triumphed over the policy of the statute *De Donis*. By the skilful use of another form of process, originally, no doubt, genuine, but likewise employed for fictitious ends, the 'Common Recovery' became firmly established as a regular means of 'barring' or destroying an entail, and converting the estate tail into an estate in Fee Simple. This is not the place in which to explain the mysteries of the Common Recovery. Briefly put, the argument was this. *A*, tenant in tail, wished to convey a fee simple to *B*, either that *B* might re-convey it to him, clear of the entail, or that he might obtain the value of an estate in fee simple, which is, of course, much greater than that of an estate tail in the same land. Acting in collusion with *A*, *B* brought an action to recover the land against *A*, or, more frequently, against some one constituted actual possessor of the land by *A* for the purposes of the process, and called 'the tenant to the *praecipe*.' This person, whilst not denying *B*'s title, called upon *A* to defend his own, by reason of a warranty which *A* was supposed to have given when he constituted the defendant tenant to the *praecipe*. *A*, in turn, called upon, or 'vouched to warranty,' *his* warrantor, who, in actual fact, was a mere man of straw in no way connected with the case, and who, upon being suffered to 'imparl' with the claimant, promptly disappeared. Thereupon it was adjudged, that the claimant should recover the lands in question, and that the defaulting warrantor should make good his false warranty by conveying lands of equal value to *A*, to be held on the terms of the original entail. This, of course, he never did; and so the issue in tail lost their succession, and the donor his

The Common Recovery.

Court thereupon recorded the plaintiff's victory, and declared the land to be his. This statement, being a royal record, could not, in theory, be disputed, even by strangers who had taken no part in the proceedings, except within a limited time. (See the so-called statute *Modus Levandi Fines*, printed as 18 Edw. I. st. IV.) Fines were very commonly used to bar claims of dower and to convey estates of married women. For an account of them see Digby, *History of the Law of Real Property*, cap. ii.

reversion. If the actual possessor of the land was not made a party to the proceedings, the recovery only operated against the issue in tail, leaving the reversioner's claims untouched.

This curious procedure had, no doubt, taken some time to develope; for the case of *Taltarum* or *Talkyrum*, decided in 1472 [1], and usually quoted as the earliest authority for it, recognizes it as already established. Since the time of *Mary Portington's* Case [2], in 1613, it has been unquestioned law that no condition of forfeiture or other device can prevent an ordinary tenant in tail suffering a Recovery, and so converting his estate into a Fee Simple.

The success of the Common Recovery was, indeed, so fully admitted by the Legislature, that, in the year 1540, it virtually repealed the Fine clause of the statute *De Donis*, by enacting [3] that a Fine duly levied with proclamations, as provided for other purposes by a statute of the year 1487 [4], by any person interested under any entail, should immediately bar the issue in tail. But the superiority of a Common Recovery for the purpose of disentailing lands lay in the fact that, if suffered by, or with the connivance of, the actual possessor of the land, it operated at once to bind, not only the issue in tail, but the reversioner; whilst a Fine would not effect the latter object until a period of five years, or possibly longer, had elapsed since its levy. The cumbrous procedure of the old Fines and Recoveries was abolished by statute in the year 1833 [5], and a simple enrolled deed substituted for them as a disentailing assurance. But the law which had grown up as a consequence of the adoption of the old fictions remains practically unaltered, and was, in fact, re-enacted by the statute.

Act to abolish Fines and Recoveries.

Not only was the tenant in tail expressly prohibited from alienating in Fee Simple by the statute *De Donis*; he was by implication prevented from making any lease of the land

Leases by a tenant in tail.

[1] Y. B. 12 Edw. IV. pl. 25. fo. 19 a.
[2] 10 Rep. 35 b. [3] 32 Hen. VIII. c. 36 (5). [4] 4 Hen. VII. c. 24.
[5] 3 & 4 Will. IV. c. 74. As to the operation of this statute, see post, cap. xxii.

which could be enforced against the issue in tail or the reversioner. This was, perhaps, a mere corollary of the main rule; but it very seriously diminished the value of the land to the tenant in tail. And, after the tenant in tail had acquired the power of complete alienation in the manner above described, it became absurd to prohibit him making reasonable leases without resorting to the expensive process of suffering a Recovery.

Statute of 1540.

Accordingly, in the year 1540, a statute was passed [1] which enabled tenants in tail, including married women, to make short leases of their entailed lands, which should be binding upon the heirs in tail and the remaindermen or reversioners. The Act carefully specified several conditions [2], the observance of which was made essential to the complete validity of the leases; and the power of leasing created by the Act only applied to lands which it had been the custom to let on lease.

Statute of 1833.

Its provisions were, however, practically superseded [3] by the forty-first section of the Fines and Recoveries Act, 1833 [4], which implicitly sanctioned the making, by ordinary deed, of leases of any entailed lands for a period not exceeding twenty-one years (to take effect within twelve months from the date), provided that the lease reserved, in each case, a rent of not less than five-sixths of the full rental value of the land, the benefit of which, of course, went to the heir in tail or other successor of the lessor, in case the latter died before the expiration of the lease. But even this power, though it is perfectly distinct from, has yet been largely superseded by the powers conferred by the Settled Land Act, 1882 [5], which treats the tenant in tail *in possession* as a tenant for life under a settlement, and authorizes him to effect leases, sales, and other dispositions of the land, without having resort to the special form of disentailing assurance provided by the Fines and Recoveries Act. These powers, which will

Settled Land Act, 1882.

[1] 32 Hen. VIII. c. 28. [2] See § 2.
[3] They were not actually repealed till 1856 (19 & 20 Vict. c. 120. § 35).
[4] 3 & 4 Will. IV. c. 74. [5] 45 & 46 Vict. c. 38. § 5.

be specified in detail when we come to deal with estates for life, do not, however, render obsolete the powers conferred by the Fines and Recoveries Act; for, wide as they are in some respects, they are in others specially restricted. Thus, the tenant for life, when exercising the statutory powers conferred by the Settled Land Act, is virtually, though not technically, in the position of a trustee for all parties interested in the settled land[1]. He must, accordingly, act with a due regard to their interests. But the tenant in tail exercising the powers of the Fines and Recoveries Act is merely taking advantage of his own personal rights. And he cannot be interfered with, even though his acts should be manifestly to the detriment of the heir in tail, as, of course, they often are. A sale effected under the Fines and Recoveries Act enables the tenant in tail to pocket the whole of the purchase money. A sale under the Settled Land Act merely produces a re-investment, of which the tenant in tail will only be entitled to the annual produce. Again, the tenant in tail in remainder may exercise, at least with the necessary consents, the powers of the Fines and Recoveries Act; but the special powers of the Settled Land Act are conferred only on the tenant in tail in possession[2].

Statute of 1833 not wholly superseded.

But with the restrictions on alienation, now, as we have seen, virtually removed, the difference between the powers of a tenant in tail and a tenant in Fee Simple may be said to end. The tenant in tail has complete powers of dealing with the land, and he cannot be prevented from committing the most arbitrary and reckless acts of destruction[3].

Other rights of a tenant in tail.

There are, however, two special cases of tenancy in tail which differ in important respects from the usual rules. One is the so-called 'tenancy in tail after possibility of issue extinct.' It can only occur where the donee in special tail

Tenancy in tail after possibility.

[1] 45 & 46 Vict. c. 38. § 53. [2] ib. § 58.

[3] *A fortiori*, he cannot be held answerable for mere neglect. If a tenant in tail insures buildings and they are burnt down, the insurance money belongs to him absolutely as personalty. *Warwicker* v. *Bretnall* (1882) 23 Ch. D. 188.

can no longer have issue capable of inheriting under the limitation. Thus, if land be given to *A* and the heirs of his body by *M*, and *M* die, leaving no issue by *A*, or leaving issue who subsequently become extinct, the estate tail must come to an end at *A*'s death. *A* is now called 'tenant in tail after possibility of issue extinct,' and, though still, in theory, a tenant in tail, he cannot exercise the powers conferred by the Fines and Recoveries Act, 1833[1]. It is even a moot point whether he is entitled to commit Waste; and the better opinion appears to be that, although he cannot be made liable to an action of Waste, yet he may be restrained from committing it[2], on the ground that the property in articles severed from the land would not be in him, but in the remainderman or reversioner. But the quasi-fiduciary powers conferred upon the tenant for life by the Settled Land Act, 1882, are expressly made exercisable by the tenant in tail after possibility[3].

Tenants in tail of the Crown.

The second special case is that of the tenant in tail where the reversion is in the Crown. And here a distinction must be drawn between cases in which the land was 'purchased with money provided by Parliament in consideration of public services,' and cases (usually of old standing) in which the estate tail was created by the personal bounty of the Crown. In the former instance, the tenant is bound by the express terms of the instruments affecting his estate, and cannot avail himself either of the Fines and Recoveries Act, or of the Settled Land Act[4]. In the latter, he cannot aliene for his own benefit under the Fines and Recoveries Act[5]; but he can exercise the powers of a tenant for life under the Settled Land Act[6].

[1] 3 & 4 Will. IV. c. 74. § 18.

[2] See the cases in the Nottingham MSS., *Skelton* v. *Skelton* (1677) and *Abrahall* v. *Bubb* (1679), quoted in the notes to *Davis* v. *the Duke of Marlborough* (1819) 2 Swanston, at p. 170. The contrary opinion was delivered by the Court of King's Bench in *Williams* v. *Williams* (1810) 12 East at p. 221, but no reasons were given. In no case, it is presumed, could a tenant in tail be made liable for mere non-repair.

[3] 45 & 46 Vict. c. 38. § 58 (vii).

[4] See 34 & 35 Hen. VIII. (1542) c. 20; 3 & 4 Will. IV. (1833) c. 74. § 18; 45 & 46 Vict. (1882) c. 38. § 58 (i).

[5] 3 & 4 Will. IV. (1833) c. 74. § 18.

[6] 45 & 46 Vict. (1882) c. 38. § 58 (i).

CHAPTER IV.

ESTATES IN SOCAGE (*continued*). THE ESTATE FOR LIFE.

THE estate for life, though certainly not now of the importance once belonging to it, has still, by reason of its survival in marriage and other settlements, great practical interest for the lawyer. The new class of estates for life, created by settlement, have succeeded to the characteristics of the old life estates of feudal days; but they have also certain special characteristics of their own, as will shortly appear.

Definition.

An estate for life is created whenever land is limited by the terms of a deed to an individual or individuals simply, without words of inheritance, or mention of any specific period; whether it be expressly said that he or they are to hold for life, or not. In the case of a Will, as we have seen, a similar limitation will be construed as giving an estate in Fee Simple, in the absence of rebutting circumstances[1]. But, even in a Will, should the testator's intention obviously be opposed to the devise of an estate of inheritance, a limitation such as described would confer an estate for life.

Corporations cannot have estates for life.

In the statement of the foregoing rule, the expression 'individual or individuals' is material. A limitation to a corporation aggregate, though without words of inheritance, will, if it take effect at all, confer a fee simple[2]. For

[1] 7 Will. IV. & 1 Vict. c. 26. § 28; ante, p. 29.

[2] Co. Litt. 94 b.

a corporation has no life, in the ordinary sense of the word; neither can it have heirs[1]. The case of a corporation sole is less certain; and it seems probable that, unless the word 'successors' be used, the donee obtains only an estate for life[2]. But this is really equivalent to saying that he takes the estate in his personal capacity, burdened, it may be, with a trust on behalf of his office.

Rights and duties of tenant for life at common law.

The temporary character of the estate for life is responsible for the two brief rules in which the common law powers and incapacities of the tenant for life may be summarized. (1) He may make whatever use of the land is consistent with it being handed over to his successor in the same condition as when he received it, and no other. (2) His representatives have no claim upon the land after his decease, whatever improvements he may have made upon it. But both of these rules are subject to explanation and exception.

Estovers.

(1) To the positive side of the first rule, which in itself entitles the tenant for life to the full enjoyment in its existing condition and to the perception of all the annual profits of the land, must be added the ancient right of *estovers*, belonging to every legal tenant for life, that is to say, his right to cut as much timber as is necessary for the ordinary needs of an agriculturalist, even though the condition of the land be thereby altered. The right is subdivided into three branches, known as 'Housebote,' 'Ploughbote,' and 'Haybote' respectively. By the first, the tenant for life is entitled to cut as much timber as is reasonably necessary for repairs to his buildings and fuel for his house. By the second, he is entitled to timber for the repair and renewal of his agricultural implements; and by the third to as much as is needed for the maintenance of his hedges or 'hays[3].' The timber when cut must, of course, be employed for the specified purposes.

Housebote.

Ploughbote.

Haybote.

Waste.

The negative side of the first rule is frequently stated in

[1] Which is, no doubt, the reason why, on the dissolution of a corporation, its lands revert to the donors, instead of escheating to the lord. (Co. Litt. 13 b.)

[2] ib. 94 b.

[3] ib. 41 b, 53 b.

this way—that the tenant for life must not commit Waste. And the legal definition of Waste includes not only any act which will deteriorate the value of the land, but any act which will change its character. In other words, the successor of the tenant for life is entitled to have the land, not merely in as good condition, but in the same condition as when it came to the tenant for life[1]. Thus, the conversion of arable land into pasture (though the latter may be the more valuable), the opening of new mines (though the result should be greatly to increase the value of the land), the pulling down of buildings (though they be replaced by better), and the cutting down of timber (except for the purposes of *estovers*) are acts of Waste. It has long been a moot point whether the tenant for life is liable for 'permissive Waste,' i.e. for the loss consequent upon mere neglect to repair. But it must now, since the decision in *Re Cartwright*[2], be taken as the better opinion that there is no such liability, unless it has been created by special obligation.

Penalties of Waste.

Originally, it is said, the penalty of Waste was merely the forfeiture of the place wasted; but the ancient statutes of Gloucester[3] and Westminster II[4] added the heavy penalty of threefold damages, to be recovered by Writ of Waste. The latter Writ, which replaced a still more ancient Writ of Prohibition of Waste[5], was abolished by the Real Property Limitation Act, 1833[6], and the claim for threefold damages by the Civil Procedure Act Amendment Act, 1879[7]; but both had long been superseded in practice by other remedies. One

[1] Co. Litt. 53.

[2] (1889) 41 Ch. D. 532. And the decision must be held to apply to actual liability, as there was no question of an injunction. The cases quoted in Snell's *Equity* (11th ed., 592) are cases of tenants for years.

[3] 6 Edw. I. (1278) c. 5.

[4] 13 Edw. I. (1285) st. I. c. 14.

[5] This seems to have been very much in the nature of the Chancery injunction of later times; for contempt of it was followed by attachment. Its weak point was that it gave no remedy for Waste already committed. (13 Edw. I. st. I. c. 4.)

[6] 3 & 4 Will. IV. c. 27. § 36.

[7] 42 & 43 Vict. c. 59.

of these was the Action on the Case, founded on the famous *Consimilis Casus* clause of the Statute of Westminster II[1]; but this also was early superseded by proceedings in Chancery, which Court assumed a jurisdiction to grant an injunction to stay the commission of apprehended Waste[2]. The weak point of the old Chancery procedure was, however, that the Court had no power to award damages for the Waste actually committed. When this defect was remedied by the Chancery Amendment Act of 1858[3], the Court of Chancery acquired almost the entire jurisdiction in Waste, until the Judicature Act created an uniform procedure for the High Court.

Who may enforce.

The owner of the next estate of inheritance is the person entitled to complain of Waste committed by a tenant for life; and he may bring the action, even though another life estate intervene between him and the delinquent[4]. The right to claim forfeiture appears to have been disused even before the repeal of the Statute of Westminster II; and, though the property in any articles (e. g. timber) severed by the act of Waste will belong to the plaintiff[5], his other remedies will be restricted to the award of single damages, and costs. It must be remembered, moreover, that an action of Waste is an action of Tort, unless the defendant have broken an express covenant. It will not, therefore, lie against the executors of the delinquent, unless it comply with the special provisions of a statute passed in the year 1833[6], which enables a person

[1] It seems likely that the action on the case for Waste only lay where the Writ of Waste could not be brought. See Y. B. 14 Hen. VIII. M. pl. 6. fo. 11, *Potkin's* Case (1522).

[2] This procedure, which was said in the year 1599 by Lord Keeper Egerton to be as old as the reign of Richard II, was probably also only resorted to at first for cases in which the Writ of Waste would not lie. See Moore's Reports, 554. pl. 748.

[3] 21 & 22 Vict. c. 27. § 2.

[4] This is a rule introduced by Equity. The common law required 'privity of estate' between the parties to an action of Waste. (Moore, 554.)

[5] *Garth* v. *Cotton* (1750) 1 Ves. Sr. 524; and be recoverable by what, before the Common Law Procedure Acts, would have been an action of Trover. *Herlakenden's* Case (1589) 4 Rep. 62.

[6] 3 & 4 Will. IV. c. 42. § 2.

injured in respect of his property by *A* within six months of *A*'s death, to recover against *A*'s personal representatives by action brought within six months of the assumption of office by the latter. There is a highly technical rule to the effect that if, after Waste committed, the owner of the next estate of inheritance alienate it, no action can be brought against the wrong-doer[1]. The original remainderman cannot bring the action, for there is now no 'privity' between him and the wrong-doer; the alienee cannot, because the wrong was not committed against him. The heir of the person injured can, however, if he have inherited the latter's estate, bring the action; he being expressly authorized by an old statute[2].

'Without impeachment of Waste.'

The liability of the tenant for life with regard to Waste may, however, be varied by the express terms of the instrument creating estate. Thus, he may undertake repairs, and then a failure to repair will constitute Waste. But the most usual case of variation is that in which the tenant for life is made 'without impeachment of Waste.' The construction put upon this phrase is somewhat arbitrary. On the one hand, it has been held to confer upon the tenant for life complete immunity from any action for damages, in respect of Waste committed. On the other, it has long been the practice of the Court of Chancery, and its successor, the High Court of Justice, in spite of the existence of the clause, to restrain by injunction the commission of wanton acts of destruction, such as the defacement or pulling down of a family mansion, and the felling of ornamental timber. The classical case is *Vane* v. *Lord Barnard*, decided in 1716[3], in which the defendant, tenant for life without impeachment of Waste of Raby Castle, had, in a fit of temper, stripped the castle of lead, iron, glass doors, and boards. But the principle has since been extended to all cases of wanton destruction. In one report of this case[4], it is boldly stated as the opinion of the Court, that the clause, 'without impeachment of

'Equitable Waste.'

[1] *Bacon* v. *Smith* (1841) 1 Q. B. 345.
[2] 20 Edw. I. (1292) st. II.
[3] 2 Vern. 738.
[4] Gilbert's *Reports of Cases in Equity*, 127.

Waste,' merely operates 'to excuse from permissive Waste.' But this is certainly going too far; and, in spite of some doubts, it is now firmly held, that a tenant for life without impeachment of Waste is not merely excusable from consequences if he commits ordinary Waste, but that he is entitled to the fruits of his acts, e. g. to ordinary timber felled by him, and minerals from newly opened mines [1]. But a tenant for life, even though without impeachment, will still be restrained from committing acts of wanton destruction; acts which have received the curious name of 'Equitable Waste,' because they were at one time only cognizable by a Court of Equity. And, inasmuch as the Judicature Act of 1873 [2] expressly enacts that an estate for life without impeachment of Waste shall not confer upon the tenant any legal right to commit Equitable Waste, it would seem that the tenant for life is now liable to an action for Equitable Waste actually committed, as well as to an injunction prohibiting its commission in the future [3].

Negative character of estate for life.

(2) As regards the second rule in which the powers and incapacities of the tenant for life have been summarized, viz. that his representatives have no claim upon the land after his decease, little need be said at this point. The two chief exceptions to the rule are to be found in the matter of *emblements* and the matter of fixtures.

Emblements.

Emblements are the produce of crops sown by a tenant with a limited estate, and which have not matured at its termination. He or his executor has a right to enter and reap the harvest in a husbandlike manner, doing no damage to the land. But it is essential to a claim for *emblements*, (*a*) that the person on whose behalf the claim is made should have had an estate which has terminated through no fault of his own, (*b*) that the estate should have been of uncertain duration, so that he could not know when it would end. Thus, the

[1] *Lewis Bowles'* Case (1616) 11 Rep. 83 b.

[2] 36 & 37 Vict. c. 66. § 25 (3).

[3] Even if he were not before. See the remarks of Lord Romilly in *Bubb* v. *Yelverton* (1870) L. R. 10 Eq. 466.

tenant for his own life, or for that of another, the lessee for years of a tenant for life[1], the tenant at will, the husband seised in right of his wife[2], and the heiress whose estate is defeated by the birth of an heir, are all entitled to *emblements*, provided that they have not by their own voluntary act put an end to their estates[3]. But where the estate of the claimant is determined by a right paramount, e. g. by a new comer who proves his title to be superior to that of the person from whom the claimant held, no *emblements* can be claimed[4]. And the importance of the subject has been greatly diminished by the passing of the Emblements Act of 1851[5], which provides that, upon the determination of a lease for years by reason of the failure of the estate of the lessor, the lessee shall remain in occupation till the end of his current year of tenancy, in lieu of claim to *emblements*; the succeeding landlord being entitled to a proportionate amount of rent from the determination of his predecessor's estate, and the tenant holding on the same terms as before. The recovery of the rent has been made still easier by the passing of the Apportionment Act, 1870[6], which treats all rent and other periodical payments as accruing from day to day. But it must be remembered that the Emblements Act only applies to tenants at rack rent of any farm or lands, and only to these where their tenancies expire by virtue of the determination of the uncertain estate of their landlords. The right to *emblements* is disposable by will[7].

Fixtures.

It is, perhaps, usual to treat the claim of the tenant for life or his representatives to fixtures put up by him, as a branch of the law of Waste. But the two cases are radically distinct. The latter is an attempt to deprive the next estate of inheritance of substance which never belonged to the

[1] i. e. presumably, if his lease is not made under special powers which render it valid despite the death of the tenant for life.

[2] This case can now very rarely happen, owing to the operation of the Married Women's Property Acts, as to which, see post, cap. xvi.

[3] Co. Litt. 55. [4] ib. [5] 14 & 15 Vict. c. 25. § 1.

[6] 33 & 34 Vict. c. 35. § 1. [7] 20 Hen. III. (1235) c. 2.

tenant for life, and to which he can therefore, in the absence of special conditions, manifestly have no title. The former is merely a claim to remove articles which at one time clearly belonged to the tenant for life, but which, owing to a highly technical rule of law, are deemed to have become part of the inheritance, because they have been fixed into the land, or buildings which stand on the land. *Quidquid plantatur solo, solo cedit.* It is thus manifest that a claim to fixtures strongly resembles a claim to *emblements*[1].

Trade fixtures.

The technical rule of law has been relaxed in three cases. One, where the tenant for years claims, as against his landlord, to remove fixtures which he has put up for the purpose of trade or convenience. This is by far the most liberal exception, and is the parent of the other two. It will be discussed in connection with estates for years. The second case is the present, viz. where the tenant for life, or his representative, claims to remove fixtures put up by him; and the third occurs where the executor of a deceased tenant in fee simple claims fixtures as against the heir or devisee[2]. The principal authority on behalf of the tenant for life is *Lawton* v. *Lawton*, decided by Lord Hardwicke in 1743[3]. In that case the Court decreed a valuable engine which had been fixed up by the tenant for life of a colliery to be assets for payment of his debts. Evidence was given to show that such articles were easily removed, and that it was customary to remove them[4]. But the argument which seemed to weigh with the Court was that, even after the removal of the engine, the mine was quite capable of being worked, though, of course, not so rapidly or profitably as before.

Fixtures of tenant for life.

Fixtures of executors.

[1] As was, indeed, observed by Lord Hardwicke in *Lawton* v. *Lawton* (1743) 3 Atkyns, p. 16.

[2] It is presumed that this point will still be of importance as regards the beneficial interest, notwithstanding that heir and executor are now the same person by virtue of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65. § 1).

[3] 3 Atkyns, 13.

[4] Presumably this was not a 'custom' in the strict sense, i. e. local rule of law. Otherwise the case could not have required decision.

This last condition lies at the root of all claims to fixtures by particular tenants. No removal of fixtures by such persons will be allowed, if their removal would physically injure the freehold[1]; but, subject to this restriction, fixtures put up by the tenant for life for the purposes of carrying on trade, or for purposes of personal convenience or ornament, may be removed by him or his representatives[2]. It is important, however, that the claim of the latter should be emphasized by severance of the fixtures while they are still in the position of tenants at sufferance—i. e. before the premises have actually been taken over by the remainderman. For fixtures cannot be recovered by an action of trover[3]; and it would be difficult to frame any other action by which the remainderman could be forced to give them up. The precedent of *Lawton* v. *Lawton*[4], however, which was a bill in Equity, shows that the Court might, on equitable principles, order the remainderman to permit severance by the claimants.

Statutory powers of a tenant for life.

We now come to deal with the very important administrative powers conferred upon tenants for life by recent statutes. One of the chief objections to the practice of putting land into settlement has always been, that the management of the land must necessarily be in the hands of successive owners with limited interests, who do not feel inclined to expend large sums of money in improvements, the benefit of which will principally be reaped by their successors. To remedy this drawback, it early became customary to insert in settlements express powers authorizing limited owners to charge the *corpus* of the settled property with certain sums to be expended in permanent improvements, e. g. draining; and sometimes such powers were given by Acts of Parliament.

[1] This rule was expressly approved of in *Avery* v. *Cheslyn* (1835) 3 A. & E. 75.

[2] *Lawton* v. *Lawton* (1743) 3 Atkyns, 13; *Harvey* v. *Harvey* (1740) 2 Str. 1141. The last was a case between heir and executor of the same person. But it is presumed that the case between tenant for life and remainderman would be equally strong in favour of the former. It must be admitted, however, that the decision is very briefly reported.

[3] *Minshall* v. *Lloyd* (1837) 2 M. & W. at p. 459.

[4] 3 Atkyns, 13.

These powers were summarized and consolidated by the Improvement of Land Act, 1864 [1], and new powers added by the Limited Owners Residences Acts of 1870 [2] and 1871 [3], and the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 [4]. But by far the most sweeping powers have been conferred by the Settled Land Act, 1882, and its amendments [5], to which we must now refer in detail.

And, in the first place, it must be premised that, although these powers are only exercisable by a 'tenant for life under a settlement,' yet the definition of a 'settlement' adopted by the Act is such as practically to include every instance of an estate for life, except that of a dowress, a tenant *pur auter vie* at a rent, and a trustee [6]. More than that, it includes under the definition many cases which would certainly not be regarded as estates for life in the ordinary sense, viz.:

Artificial tenants for life.

(i) A tenant in tail (other than a tenant in tail of land 'purchased with money provided by Parliament in consideration of public services'),

(ii) A tenant in Fee Simple whose estate is liable to be defeated by reason of an executory limitation over [7],

(iii) The tenant of a Base Fee (even where the reversion is in the Crown) [8],

(iv) A tenant for years determinable on life, 'not holding merely under a lease at a rent [9],'

[1] 27 & 28 Vict. c. 114. [2] 33 & 34 Vict. c. 56.
[3] 34 & 35 Vict. c. 84. [4] 40 & 41 Vict. c. 31.
[5] 45 & 46 Vict. c. 38; 47 & 48 Vict. (1884) c. 18; 50 & 51 Vict. (1887) c. 30; 52 & 53 Vict. (1889) c. 36; 53 & 54 Vict. (1890) c. 69.
[6] Settled Land Act, 1882, §§ 2 (5) and 58 (1) (v). As to the terms 'dowress,' 'tenant *pur auter vie*,' &c., see post (pp. 54–56 and cap. xvi).
[7] As to this see post, cap. vii.
[8] A Base Fee is created by the attempt of a tenant in tail to convey a fee simple by an assurance which only operates to bar his issue, not the remainderman. On the failure of the issue in tail, the remainderman may, of course, enter and avoid the Base Fee. (For an exhaustive summary of the possible instances, see Challis, *Law of Real Property*, and ed., cap. xxii.)
[9] It is extremely difficult to forecast the construction which would be put on this phrase by a court of justice. Suppose a lease to *A* for 1,000

(v) A tenant in tail after possibility of issue extinct,

(vi) An equitable tenant for life [1],

(vii) An infant seised of or entitled in possession to land [2].

The one indefeasible condition is, that their interests shall be in present appreciation, either by actual possession of the land, or by perception of the income [3].

The statutory powers conferred by the Acts upon the persons answering this description are as follows:—

(i) To sell the settled land, or any part, or any right over the same, to exchange it, with or without compensation for inequality, and to carry out a partition when it is held in undivided shares [4]; Sale.

[All subsidiary powers necessary to carry these objects into effect are expressly conferred upon the tenant for life [5].]

(ii) To lease any part of the settled land or any right over the same, whether involving Waste or not, for the following periods, viz.:— Leases.

(α) In case of a building lease, ninety-nine years or less;

(β) In case of a mining lease, sixty years or less;

(γ) In case of any other lease, twenty-one years or less [6];

years if *B* should so long live, at a rent of five shillings yearly. Would *A* be a tenant for life under the Act? The mysterious word seems to be 'merely.'

[1] Including a person who is entitled for his life, 'or any other limited period,' to the income of lands settled by way of trust for sale, or of the produce of such sale. (Settled Land Act, 1882, § 63 (1).) But such a person is not to exercise the statutory powers without leave of the Court. (Settled Land Act, 1884, § 7.) Recent decisions clearly show that a person may be 'tenant for life' under this definition, though he does not actually enjoy either possession or income, as, for example, when the latter is absorbed in keeping down incumbrances, and the former is vested in trustees. (*Williams* v. *Jenkins*, 1893, 1 Ch. 700.)

[2] Settled Land Act, 1882, § 59. [3] ib. §§ 2, 58, 63.

[4] ib. §§ 3, 4.

[5] e. g. to enter into binding contracts (§ 31), to raise money by way of mortgage for necessary expenses (§ 18), to make a legal conveyance of the land (§ 20).

[6] ib. § 6. Where, in the case of building or mining leases, the custom of the district is to grant longer terms or even perpetuities, or when it is proved to be difficult to secure tenants except on longer terms or in perpetuity, the Court may authorize such grants.

[Important directions, as to the conditions of leasing and the formalities to be observed, are contained in the Act [1].]

Surrenders.

(iii) To accept surrenders of existing leases, or of parts of them, either with or without an arrangement for renewal [2];

Dedications.

(iv) To dedicate land gratuitously for public objects in connection with a sale, grant, or lease for building purposes [3];

[But these powers of disposition are not, without consent of the trustees of the settlement, or the leave of the Court, to be applied to the principal mansion house or the pleasure grounds, park, and lands usually occupied therewith [4].]

Mortgages.

(v) To mortgage the settled land or any part thereof [5], for the purpose of raising money to pay off incumbrances [6];

Improvements.

(vi) To effect, out of any capital money representing the sale or disposition of any part of the settled land, any of the numerous improvements specified by the Acts, on the other part of the land [7]. [But this power can only be exercised with the approval of the trustees of the settlement, the Board of Agriculture, or the Court [8].]

At first sight it would appear, that the extensive powers conferred by the Settled Land Acts upon the tenant for life have converted his interest into that of an absolute owner. For it is of the essence of the statutes that the acts of the tenant for life shall be binding, not only on himself, but upon all his successors under the settlement, and, indeed, even upon interests not comprised in the settlement. And it is expressly

[1] e. g. the lease is to take effect in possession within twelve months, to reserve the best obtainable rent, to be by deed, and to contain proper covenants by the lessee (§ 7). In the case of a building lease, due provisions are to be made for building, and the rent is to be apportioned in such a way among the building lots that the ground rent on any one shall not exceed one-fifth of the value of the buildings and land (§ 9).

[2] Settled Land Act, 1882, § 13. [3] ib. § 16.

[4] Settled Land Act, 1890, § 10. A house usually occupied as a farm house, or a house which has not twenty-five acres of pleasure grounds (including its own site), is not to be deemed a principal mansion house.

[5] Including, presumably, the principal mansion house.

[6] Settled Land Act, 1882, § 18; 1890, § 11.

[7] Settled Land Act, 1882, § 25; 1890, § 13.

[8] Settled Land Act, 1882, § 26.

provided, that an interest not disposed of by a settlement, and therefore reverting to the settlor or his heir, shall be deemed to be comprised in the settled land. Thus, if *A*, tenant in fee simple, devise the land to *B* for life, and die intestate as to the remainder, *B* will be able to sell the whole fee simple under the Act[1]. But, of course, a tenant for life cannot dispose of any interest which did not belong to the settlor at the time when the settlement was made; nor can he get rid of incumbrances lawfully created by himself or any of his predecessors under the settlement.

Checks imposed by the statutes.

As a matter of fact, however, there are numerous safeguards imposed in favour of the successors of the tenant for life by the statutes, the policy of which is to enable the tenant for life to change the form of the property, but not the interests created by the settlement. Thus, there is the general, and very important direction, that the tenant for life shall, in exercising any power under the Acts, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties[2]. In the interests of persons who take from him in good faith under the powers of disposition conferred by the statutes, he will be presumed to have acted properly[3]. But if, as a matter of fact, he has not, he will be responsible to the persons injured; and if those who deal with him are guilty of bad faith, they

Fiduciary exercise.

[1] At least, this is the opinion of Mr. Wolstenholme. (*Settled Land Act*, p. 13.) But the reasoning is not very clear. How can the remainder in the case put be said to be 'not disposed of by a settlement'? A settlement is an instrument whereby land stands limited to or in trust for any person by way of succession. (Settled Land Act, 1882, § 2.) But the will in question does not limit lands by way of succession. Therefore it is not a settlement. Therefore the remainder cannot be said to be 'not disposed of by a settlement,' except in the sense that it is not disposed of by any instrument at all. If Mr. Wolstenholme's contention be correct, every instrument creating a smaller estate out of a larger, e.g. a lease for twenty-one years, is a 'settlement.'

[2] Settled Land Act, 1882, § 53.

[3] ib. § 54.

too will be responsible, and their titles will be void[1]. So thoroughly fiduciary are the powers of the tenant for life, that he cannot transfer them to any one else, nor even bind himself not to exercise them[2]; and any attempt in a settlement to prohibit their exercise will be invalid[3].

Custody of capital money.

Moreover, it is stringently provided that all money arising from any exercise of his statutory powers by the tenant for life, which can in any way be considered as representing the capital rather than the income of the land, shall be paid into Court or to the trustees of the settlement, and held for the benefit of the persons interested. These provisions apply, of course, especially to sales and exchanges of the land[4]; but they extend also to the fines paid to the tenant for life for leases[5], to royalties arising from mining leases[6], and to the proceeds of timber rightfully cut by a tenant for life who is not entitled to cut timber for his own benefit (by reason of his estate not being 'without impeachment of Waste[7]'). If there are no trustees of the settlement, as very commonly happens where the so-called 'settlement' is merely a deed which becomes such by the highly technical definition of the statutes, the Court will appoint persons to act[8]. Another useful provision requires the tenant for life to give notice to the trustees and their solicitor of any intention to exercise his statutory powers; but such notice may be waived by the trustees[9]. If the tenant for life, by reason of infancy, cannot himself act, his powers may be exercised by the trustees of the settlement[10]; if he is a lunatic, by his committee[11]. When a married woman is tenant for life, she acts alone if

Notice.

Infants.

Lunatics.

Married women.

[1] See *Chandler* v. *Bradley* (1897, 1 Ch. 315), where the defendant gave a sum of money to a tenant for life to induce him to grant a lease of the settled property. After the death of the lessor, the remainderman obtained a decision avoiding the lease.

[2] Settled Land Act, 1882, § 50. [3] ib. § 51. [4] ib. § 22.

[5] Settled Land Act, 1884, § 4. [6] Settled Land Act, 1882, § 11.

[7] ib. § 35. [8] ib. § 38.

[9] ib. § 45 and Settled Land Act, 1884, § 6.

[10] Settled Land Act, 1882, § 60. Every infant seised of or entitled in possession to land is to be deemed a tenant for life, § 59.

[11] ib. § 62.

she is entitled for her separate use; if not, concurrently with her husband. And a 'restraint on anticipation' does not affect her statutory powers [1].

Hitherto we have assumed that every estate for life is of the normal kind, viz. an estate limited to the tenant for the term of his own life by Will or instrument *inter vivos*. But there are one or two abnormal cases which must now be considered.

Estates for life by operation of law.

And first, those estates for life which arise by operation of law—the estate of the dowress, and the estate by the Curtesy. As to the precise circumstances under which they arise, more will be said when we deal with the rights of husband and wife in one another's property. But here it may be briefly stated, that the widow of a man who has died intestate, entitled to an estate of inheritance in possession in land, whether in fee simple or fee tail, and whether legal or equitable, is, unless her claim has been barred by him, entitled to a life estate in one-third of the lands under the name of Dower [2]. To this life estate belong the various rights and liabilities relative to *emblements, estovers*, Waste, and (probably) fixtures, which have been previously enumerated; but the dowress has none of the statutory powers of a tenant for life under the Settled Land Acts. The estate by the Curtesy, notwithstanding the Married Women's Property Acts, still entitles a husband to a life interest in those lands in which his deceased wife held an interest of inheritance, legal or equitable, in actual possession, not disposed of by her during her lifetime or by her Will, provided that he had children by her who were capable of inheriting her interest [3]. In the cases of persons married before 1883, the rights of the husband may be still more extensive, as will appear at a later stage [4]. And, where the estate by the Curtesy exists, it will, in like

Dower.

Curtesy.

[1] Settled Land Act, 1882, § 61. As to 'restraint on anticipation,' see post, cap. xvii.

[2] In the somewhat rare case of a woman living at the present day who was married before the passing of the Dower Act, 1833, she would be entitled to a good deal more than this as dower. See post, cap. xvi.

[3] *Hope* v. *Hope*, 1892, 2 Ch. 336.

[4] Post, cap. xvi.

opinion, it seems now to be settled, that an estate *pur auter vie* which comes to any personal representative comes to him *as personalty*, in the sense that it will pass to his personal representatives on his death, and be distributable among his next of kin [1]. But, of course, it can only be conveyed (if a legal estate) by a conveyance appropriate to the transfer of land; and, until recent legislation put the claims of all the creditors of a deceased person on the same footing [2], it was only liable, even in the hands of executors, for specialty debts in which the heir was named [3].

A very useful statute of the year 1707 [4] empowers all persons having any interest arising upon the death of any individual, to insist upon the production in Court of such individual, upon pain of having it assumed that he or she is dead. This statute was avowedly passed to defeat unjust attempts on the part of tenants *pur auter vie* to prolong their enjoyment of lands by concealing the death of the *cestuis que vie*.

Finally, it may be again mentioned, that the tenant *pur auter vie*, 'not holding merely under a lease at a rent,' is entitled to exercise the statutory powers of a tenant for life under the Settled Land Acts. Whether a tenant for life *pur auter vie* would be so entitled, may be regarded as a doubtful point [5].

[1] *Mount Cashell* v. *More-Smyth*, 1896, A. C. 158; *Re Sheppard*, 1897, 2 Ch. 67.

[2] 3 & 4 Will. IV. (1833) c. 104, and Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46).

[3] Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), § 6.

[4] 6 Anne, c. 18 or 72.

[5] Settled Land Act, 1882, § 58 (v). Limitation 'to *A* during the joint lives of *A* and *C*,' remainder 'to *B* and his heirs during the life of *C*.' Could *A* sell, and, if so, what interest?

CHAPTER V.

TENURE IN COPYHOLD.

THE same influences which led the feudal lawyers of the eleventh and twelfth centuries to describe the land rights of the free farmer in terms of tenure, produced a similar result, at a somewhat later period, in the case of the lower ranks of the peasantry. As to the origin of these ranks, and their personal position in the eye of the common law, this is not the place to inquire[1]. For legal purposes, they include all, or nearly all, those humbler agriculturalists who, not being tenants for definite terms of years by express contract, yet held, by virtue of local custom, certain substantial interests in land. Whether these persons were originally members of free village communities, depressed by immigrant conquerors to the position of serfs, or whether they were humble followers of some thegn who had received a grant of bookland and settled his dependents upon it, is again a question beyond the scope of this work. As soon as the common law begins to recognize such persons, it decides definitely for the latter view. The villein tenants are, in the view of the law, settlers on the land of the lord of a *manor*, that mysterious entity the precise nature of which no one yet understands, but which, in some vague way, always stands for the estate of a substantial landowner, who has at least some territorial

Villenag

The manor.

[1] Upon this deeply interesting question, the reader is referred to Digby, *History of the Law of Real Property*, 3rd ed., pp. 49-51, and to the classical works of Vinogradoff, *Villenage in England*, and Seebohm, *The English Village Community*.

jurisdiction over humbler persons, usually living near his abode.

Customary tenants.

But the recognition of such persons by the common law falls into two distinct historical stages. One is the recognition *de facto*; the other, the recognition *de jure*. The former dates at least from the reign of Henry II; Bracton, writing under Henry III, has much to say about it. Although the names used are not quite the same, we seem to be safe in identifying the future copyholders with the 'customary tenants' of the writ or commission *Extenta Manerii*, printed among the statutes of the year 1276[1], but probably of a somewhat later date.

Copyholders.

Later on, when, as the result of the great inquiry which resulted in the compilation of the Hundred Rolls, the manorial landowners adopt the habit of keeping strict records of the state of their manors, these customary tenants acquire the name of 'tenants by copy,' or 'copyholders'; because their titles are evidenced by copies of extracts from the manorial rolls, which record their names and holdings. By the end of the fourteenth century, the recognition *de facto* is complete.

But it is *de facto* only. The estate of the copyholder was not, at first, one which would be protected by the royal courts. The lord was *seised*, or feudally possessed, of the land, and he alone, therefore, could use the *assizes*, or possessory actions of the common law[2]. To have admitted that the tenant was seised, would have been to postpone the lord to the position of a mere reversioner; for two persons could not independently be seised of the same piece of land. So the common law said that the copyholder held 'at the will of the lord,' who, as he could, in theory, eject him when he pleased, could still be said to be seised.

Protected by the lord's court.

But, as time went on, the customary character of the copyholder's interest was more and more insisted upon. Though

[1] 4 Edw. I. st. I.

[2] This was the orthodox rule so late as Littleton; though whispers of the coming change were beginning to be heard. (Co. Litt. 60 b.)

he could not enforce his interest in the king's courts, he was entitled to enforce it in the lord's own court, either by plaint, against a stranger, or, by petition, against the lord himself [1]. The last may be considered a poor remedy, but it must be remembered that, even in those days, it was somewhat difficult for a judicial tribunal openly to refuse justice, even in the interest of its proprietor. Littleton, though he denies the remedy in the king's courts, says plainly—'but the lord cannot break the custom which is reasonable in such cases [2].'

By the royal courts.

Still, the position of the copyholder was very far from secure; and we are not surprised to find that efforts were continually made to improve it. One of the boldest of these was the attempt to obtain a *subpoena* in Chancery against the lord who ejected his copyholder, on the ground that his act was against conscience [3]. And it was, probably, the fear of seeing a profitable branch of business snapped up by their formidable rival, which led the common law courts, shortly afterwards, to allow the tenant in similar circumstances to use the Writ of Trespass [4]. And the privilege was slowly extended [5], until the interest of the copyholder was finally placed on as good a footing, in respect of legal protection, as the estate of the socager. Thus the copyholders were recognized *de jure*.

We proceed now to deal with the peculiar incidents of copyhold tenure, taking first those which most strikingly distinguish it from socage.

Surrender and admittance.

1. *Method of transfer.* This peculiarity, from which the tenure acquires its most common name, is not merely due

[1] Co. Litt. 60. [2] ib. 60 b.

[3] Y. B. 7 Edw. IV. M. pl. 16, fo. 19 (ann. 1466). The Court of Requests, an interesting royal tribunal, which flourished during the sixteenth and early seventeenth centuries, also made a bid for copyhold business.

[4] Ib. 21 Edw. IV. H. pl. 27, fo. 80 (ann. 1482).

[5] On the authority of a case reported in 1583 (1 Lev. 4) it is said that in the year 1572 it had been ruled that a lease for years made by a copyholder enabled the lessee to recover in ejectment against a stranger. But Coke (*Complete Copyholder*, § 51) expressly says that the copyholder himself can use none of the old real actions, either against his lord or a stranger, nor the action of ejectment.

to the original recognition of customary tenants at the time of the Hundred Rolls. Had the lord of a manor enfeoffed his villein with livery of seisin, or even made a grant to him by deed, he would have recognized his status as a freeman. And had he recognized his villein's conveyances by livery of seisin or deed, he would have made a similar admission. So the copyholder was merely 'admitted' to the number of the lord's tenants at a customary court, by the symbolical delivery of a rod [1], not enfeoffed by livery of seisin. And, when he wished to transfer his interest, he surrendered it to the lord, to the use of [2] his intended transferee, who, thereupon, sued admittance and obtained it in like manner. All these circumstances were duly recorded on the manorial rolls; and copies of the extracts relating thereto could be obtained, on payment of fees, by any person interested. These copies formed the ordinary evidences of title, although, as a matter of fact, the rolls themselves were the only real evidence. And so the tenure acquired its name of copyhold. When copyholds became devisable by Will, it was even necessary for the intending testator to surrender his interest to the use of his Will; but this rule has been abolished by statute [3]. Formerly, also, surrenders and admissions of copyholds could only take place in the Court of the Manor, held on one of the regular days. But this rule has also been abolished [4]. In other respects, however, the customary method of alienation still prevails [5]; and, as a matter of fact, it has great conveniences, notably, that evidences of title can hardly be lost, and that secret dispositions cannot be used to perpetrate frauds.

[1] Co. Litt. 61 a.

[2] Copyholds are not within the Statute of Uses. The person to whose use a copyhold is surrendered has still, therefore, only the right to claim admission; and, until he is admitted, the legal estate is not in him.

[3] 55 Geo. III. (1815) c. 192. § 1, repealed and re-enacted by Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), §§ 2 & 3.

[4] 4 & 5 Vict. (1841) c. 35. §§ 87, 90. Repealed and re-enacted by modern Acts.

[5] This statement of course applies only to the legal estate, with which alone we are now dealing.

2. *The limited extent of the tenant's rights.* It is one of the most striking features of copyhold tenure, that the estate of the tenant, however long it may be, confers upon him no right to do more than take the annual produce of the land, without altering its character. This feature, which is one of the clearest proofs of the originally feeble character of the tenant's interest, practically prohibits him, under pain of forfeiture, from doing anything that a tenant for life in socage might not do. Thus, he may not change the course of husbandry, fell timber, destroy buildings, or open mines, unless there exist a custom of the manor to a contrary intent[1]; and he is even responsible for permissive Waste, e. g. neglect to keep in repair buildings which were in good repair when he was admitted[2]. Furthermore, he commits Waste if he grants a lease for more than one year without the licence of the lord; unless the special custom entitles him[3]. Rights of tenant.

3. *The customary character of the terms of holding.* In every case, the features of the copyholder's interest will be primarily regulated by the special local custom of the manor of which it forms part. It is true that, since the common law courts have recognized the legal existence of copyholds, they have asserted a right to quash certain customs, as 'unreasonable[4].' It is true also, that the duration of the tenant's interest may, to a limited extent, and subject to the custom, be determined by the parties to any arrangement[5]. But by Fixed custom.

[1] *Blewett* v. *Jenkins* (1862) 12 C. B. (N. S.) 16.

[2] Coke, *Complete Copyholder*, § 57. This liability can now be enforced by action, as well as by forfeiture. (*Blackmore* v. *White*, 1899, 1 Q. B. 293.)

[3] Co. Litt. 59 a. Curiously enough, an attempted alienation in fee simple would not now work a forfeiture, because it would pass nothing that the tenant had not got, and so no harm would be done. But a lease for years by a copyholder creates a term valid against all but the lord and remaindermen (if any), and is, therefore, a disseisin of the lord. *Tresidder* v. *Tresidder* (1841) 1 Q. B. 416.

[4] *Badger* v. *Ford* (1819) 3 B. & Ald. 153. But the Courts will hesitate very much to declare a custom unreasonable. *M. of Salisbury* v. *Gladstone* (1861) 9 H. L. C. 692.

[5] e. g. the tenant of a copyhold fee may surrender to the use of *A* for life, remainder to *B* in fee. *Fitch* v. *Hockley* (1594) Cro. Eliz. 441.

far the greater part of the rules and incidents which go to make up the interest, will depend upon local custom. From this fact certain important consequences are deduced, viz.:—

No grant of new lands by copy.

(*a*) *Only such lands can be granted by copy as the custom authorizes.* The best proof that land is grantable by copy, is the fact that it has been before so granted. By special custom, a lord may have the right to grant fresh copy out of the waste, with the consent of the Homage, or court of tenants[1]. But, even where such custom exists, it cannot now be exercised without the consent of the Board of Agriculture; and, when it is so exercised, the land will be held in socage, and not by copy[2].

Nor of new interests.

(*b*) *Only such estates may be granted as the custom authorizes.* Generally speaking, the manorial customs have followed the common law limitations; but it does not follow that in all manors customary estates in fee simple, tail, and for life can indifferently be granted. In some cases, the estate tail, in others, the estate for life, is the largest interest recognized. In some manors there is a custom to entail[3]; in others, a grant or surrender 'to *A* and the heirs of his body' will create a conditional fee, alienable on birth of issue[4]. For the statute *De Donis* does not apply to copyholds[5].

Position of lord.

(*c*) *The act of the lord in admitting a new tenant is ministerial, not administrative.* And therefore, if the lord is *de facto* seised of the manor, the admittance is good, even though the lord's title be limited or bad[6]. This rule does not apply where the act is really an exercise of the lord's discretion, e.g. a licence to grant leases[7]. But it does, apparently, hold good in enfranchisement under recent legislation[8].

Division of copyhold tenements.

(*d*) *A copyhold tenement is indivisible by act of the parties, unless there be a custom to that effect, and even then, only with*

[1] *Lascelles* v. *Onslow* (1877) 2 Q. B. D. 433.
[2] Copyhold Act, 1894 (57 & 58 Vict. c. 46), § 81.
[3] *Crowe* v. *Baldwere* (1793) 5 T. R. at p. 111.
[4] *Spencer* v. *Clark* (1822) 5 B. & Ald. 458.
[5] Coke, *Complete Copyholder*, § 47. [6] ib. §§ 34, 41.
[7] *Petty* v. *Evans* (1610) 2 Brownlow, 40.
[8] Copyhold Act, 1894 (57 & 58 Vict. c. 46), § 94.

the licence of the lord. At the common law, apparently, the lord could not even grant a licence to divide[1]; but this rule has been altered by statute[2]. Partition of copyholds may also be made by co-owners, even without the lord's consent[3]; so that a division can indirectly be effected, by transfer to two or more persons as tenants in common or joint-tenants, who may then effect a partition[4].

Communal character.

4. *The communal character of the holding.* Although it is said that a manor may exist 'by reputation' without tenants, and certainly without copyholders[5], yet a copyhold cannot exist without a manor. And so, if the reversion on a copyhold tenement be alienated away from the manor of which it forms part, the tenement will cease to be copyhold, and can be disposed of by common law conveyance[6]. If the alienation of the reversion be only temporary, the copyhold character will only be suspended. In any case, the rights of the copyholder cannot be affected by such a proceeding. The communal character of the copyholder also entitles him, in the majority of cases, to valuable rights over waste lands, of which we shall have to speak later on.

Enfranchisement.

5. *Capacity for enfranchisement.* By the operation of the law of 'merger,' as we shall hereafter see, when a larger and a smaller interest in the same piece of land become united in the same person, the smaller interest is extinguished in the greater and disappears. If, in any such case, the smaller interest be a copyhold tenement, its copyhold character is gone, though it may possibly be revived at a future date. But copyholds are also subject to a very special process, called 'enfranchisement,' by which, without any transfer of estate from the lord to the tenant, the copyhold character of the

[1] Coke, *Complete Copyholder*, § 41; *Rayer* v. *Strickland* (1842) 2 Q. B. 792. Possibly this rule only applied to a lord with a limited interest.

[2] Copyhold Act, 1894, § 86.

[3] ib. § 87. But, apparently, the aid of the Court must be obtained if the lord refuse.

[4] As to the meaning of these terms, see post, cap. xxi.

[5] *Clayton* v. *Williams* (1843) 11 M. & W. 803.

[6] *Wakeford's* Case (1588) 1 Leon. 102; *Phillips* v. *Ball* (1859) 6 C. B. (N. S.) 811.

tenant's interest disappears, wholly or partially, and he becomes a tenant in socage. This process, which, historically speaking, took its rise in the villein's personal capacity of enfranchisement, has now assumed great importance, owing to the favour with which it has been regarded by the Legislature for the last fifty years.

Voluntary.

The so-called 'enfranchisement' by agreement of the lord and tenant is very rarely a true enfranchisement at all, being usually a conveyance of the socage reversion to the copyholder, and, therefore, operating to extinguish rather than enfranchise the copyhold[1]. The distinction is very important; for, inasmuch as it is, in such a case, the tenant's interest, and not the lord's, which is destroyed, it follows that any incumbrances and defects upon or in the title of the latter would, but for the express provisions of recent statutes[2], still affect the so-called enfranchised tenement[3]. And it is conceived that, even if the voluntary enfranchisement were effected by release of manorial rights, a defect in the title of the lord would have prevented the extinction of the latter. It is true that a lord with limited interest is enabled to effect a voluntary enfranchisement by virtue of the Settled Land Act, 1882, provided that his own title be good[4]. But the real protection to enfranchising copyholders and purchasers from them is to be found in the long series of statutes, commencing with the year 1841[5], and culminating in the Copyhold Act, 1894[6], which has been passed with the object of facilitating, not merely voluntary enfranchisements, but enfranchisements effected by the lord against the will of the copyholder, and

Statutory.

[1] Elton, *Copyholds*, 2nd ed., 354.

[2] e. g. Copyhold Act, 1894, § 89.

[3] It is true that a future purchaser of the enfranchised tenement would have no right to call for proof of the lord's title. (Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 3.)

[4] 45 & 46 Vict. c. 38. § 3 (ii).

[5] 4 & 5 Vict. c. 35 (1841); 6 & 7 Vict. c. 23 (1843); 7 & 8 Vict. c. 55 (1844); 15 & 16 Vict. c. 51 (1852); 21 & 22 Vict. c. 94 (1858); 50 & 51 Vict. c. 73 (1887).

[6] 57 & 58 Vict. c. 46.

vice versa. The provisions of these statutes are too long and complicated to be set out here; but, broadly speaking, it may be said that they enable either lord or tenant, whether having limited interests or not [1], with the approval of the Board of Agriculture, to effect an enfranchisement which will bind all future owners. If the enfranchisement be by mutual agreement, considerable latitude is given to the parties to fix the terms of compensation to be paid for loss of manorial rights [2]. If it be effected at the instance of the copyholder, and the amount be small, the compensation takes the form of a gross sum of money paid to the lord, or into Court, to devolve along with the manor; if at the instance of the lord, or if the compensation to be paid exceeds one year's improved value of the land, it assumes the shape of an annual rent-charge equivalent to interest at four per cent. on the amount of the compensation [3]. There are elaborate provisions for fixing the amount of compensation, in case the parties cannot agree [4]. Certain useful sections enable the Board of Agriculture to refuse to allow proceedings for compulsory enfranchisement to continue, if in its opinion substantial injustice would result from enfranchisement [5], and to enable the lord to buy out the tenant's interest as an alternative to enfranchisement in certain cases [6].

Effect of enfranchisement.

There were formerly many doubts as to the precise effect of a so-called 'enfranchisement' at the common law; whether, for example, the enfranchised tenement was or was not subject to certain manorial claims, or endowed with certain manorial rights [7]. But, in respect of enfranchisements effected under the Copyhold Acts, whether voluntary or compulsory, it is now expressly provided that the enfranchised tenement shall be held free from all peculiar manorial customs [8], from every

[1] 57 & 58 Vict. (1894) c. 46. § 43. But a copyholder for life or years without right of renewal cannot compel an enfranchisement (§ 96).

[2] ib. § 15. [3] ib. § 8. [4] ib. §§ 5–7. [5] ib. § 12.

[6] ib. § 11. [7] Elton, *Copyholds*, and ed., 355, 358.

[8] There is a saving for gavelkind in Kent, and for rights of husbands and wives married before the date of the enfranchisement. (Copyhold Act, 1894, § 21.)

incumbrance or disposition affecting the manor, and from all claims by the lord, except the claim to escheats and the claim to minerals, and the franchises of fairs, markets, and sporting. But minerals and sporting rights may be made the subject of special agreement[1]. On the other hand, the copyholder's rights of common in respect of his tenement are expressly reserved[2]. It is interesting to note that, although, as a general rule, the enfranchised tenement will be held subject to precisely the same interests and limitations as the copyhold which it has succeeded, yet that an enfranchisement effected by a tenant in tail in possession will give him a fee simple[3]. The enfranchisement provisions of the Copyhold Act, 1894, apply not only to copyholds, but to the commutation of all manorial incidents affecting land of any tenure[4].

We now come to the incidents of copyhold tenure which correspond more closely with those of socage, viz.:—

Fealty. 6. *Fealty.* It is quite clear on the authorities that, in theory, there might be a custom in any manor to the effect that every copyholder on admittance had to take the oath of fealty[5], and that, until the year 1710, the ceremony could actually be enforced[6]. Probably, the right to exact fealty would not be barred by twelve years' lapse under the Statutes of Limitation; but, as the custom is local, not a part of the common law, a long interruption of render would give rise to a presumption of release[7].

Quit rents. 7. *Rent,* or, as it is more commonly called, *quit-rent,* being the pecuniary compensation into which the works and

[1] Copyhold Act, 1894, § 23.

[2] ib. § 22. As to the position of the enfranchised holder with respect to common, the recent case of *Ramsey* v. *Cruddas* (1893, 1 Q. B. 228) should be studied.

[3] *Re Hart* (1889) 41 Ch. D. 547.

[4] Copyhold Act, 1894, § 2. [5] Co. Litt. 63 a.

[6] *Cox* v. *Higford* (1710) 2 Vern. 66 a. Coke speaks of the fealty of copyholders in his day as a matter of 'common experience' (*Complete Copyholder,* § 20).

[7] *Emery* v. *Grocock* (1821) 6 Madd. 54.

services' of the customary tenant have been resolved. The precise date of such a commutation can rarely be ascertained; but the amount of the quit-rent can be settled by reference to the court rolls, and is usually mentioned in the record of the admittance. It is interesting to note that, if a quit-rent is fixed alternatively in money or corn, the copyholder may still, if he pleases, pay in corn, notwithstanding a long course of payment in money[1]. A lord may distrain or bring an action for a quit-rent[2]; but his claim will be barred by non-receipt without acknowledgement for twelve years[3].

Suit of court.

8. *Suit of court.* In the absence of special custom, every copyholder of a manor formed one of the copyhold 'Homage,' and was bound to attend the customary court on the usual days, upon pain of fine, distress, and forfeiture[4]. Formerly no administrative or even ministerial act affecting the constitution of the manor, e. g. the admission of a new copyholder, or the forfeiture of a tenement, could be done elsewhere than in the lord's court, presided over by himself or his steward. And it was the duty of the Homage there to 'present' or take formal notice of any circumstances affecting the constitution or well-being of the manor, such as deaths of copyholders or surrenders of their tenements, or illegal encroachments on the waste. But recent legislation has greatly diminished the importance of manorial courts. All grants, admittances, and surrenders of a normal character may now be made in or out of court; and, even where it is necessary to hold a formal court, e. g. to make proclamations of vacant tenements, such court may be held though there are no copyhold tenants in existence or present. But for

[1] *Blewett* v. *Jenkins* (1862) 12 C. B. (N. S.) 16.

[2] 4 Geo. II. (1730) c. 28. § 5.

[3] 3 & 4 Will. IV. (1833) c. 27. § 2; 37 & 38 Vict. (1874) c. 57. § 1.

[4] Coke, *Complete Copyholder*, § 57. It appears that the lord cannot distrain for the fine without special custom (*Rowleston* v. *Alman* (1600) Cro. Eliz. 748); nor, if he distrain instead of fining, can he sell the distress (*Gomersall* v. *Medgate* (1610) Yelv. 194). Whatever be the rule for freeholders, the fine of a copyholder may be fixed by the steward (*Rowleston* v. *Alman*, ante, *per Curiam*).

recording a consent to a grant of a copyhold tenement out of the waste, a proper customary court must still be held [1].

Fines on descent.

9. *Fines on descent,* which are the equivalent of the socage Reliefs, and are payable by the heir on claiming to be admitted to the tenement of his ancestor. The amount of the fine is fixed in each case by the custom of the manor, or left to be named by the lord, in which case it is called 'arbitrary.' But there is a theory, not very strongly fortified by authority, which restricts the amount demandable upon an arbitrary fine to two years' improved value of the land [2]. The fine is not payable till after admittance; but if the heir will not seek admittance, the lord may seize the tenement for want of a tenant.

Fines on alienation.

10. *Fines on alienation,* which were expressly reserved in the case of copyholds by the statute of 1660 [3], are payable either for licence to demise, or upon alienation of the tenant by surrender. They may also be payable on alienation of the manor by the lord; but it is said that, to found such a claim, the alienation must be by act of God, i. e. death [4]. There is no definite restriction upon the amount of an arbitrary fine on alienation; and fines of three, five, and even seven years' value have been allowed [5].

Heriots.

11. *Heriots,* unlike fines on alienation, are seizable by the lord, in virtue of special custom, on the death of a copyholder, and irrespective of the admittance of a new tenant. They may also be claimable upon alienation. The precise form of the heriot varies greatly with local custom; but it is usually the best beast or chattel, not necessarily within the tenement,

[1] Copyhold Act, 1894, §§ 82–5.

[2] Blackstone, *Comm.* (4th ed.) II. 98, quoting *Morgan* v. *Scudamore* (1677) in 2 Chancery Reports, 70 (3rd ed.), 134 (2nd ed.).

[3] 12 Car. II. c. 24. § 6.

[4] Co. Litt. 59 b. But a custom to demand a fine on the death of the last admitting lord, though he had alienated the manor to the claimant by act *inter vivos*, has been held to be good. (*Lowther* v. *Raw* (1735) 2 Bro. P. C. 451.)

[5] *Fraser* v. *Mason* (1883) 11 Q. B. D. 574; *King* v. *Dillington* (1687) Freeman, K. B. 494.

or even within the manor. As soon as the lord has made his selection, the property in the heriot vests in him, and he may seize it, if he can do so peaceably [1], or bring trover or detinue for it [2]. A *bona fide* sale in market overt will, however, defeat the lord's claim.

Besides the normal heriot due on the death or alienation of a copyholder by special custom, and known as 'heriot custom,' there exist two other kinds of heriots, known as 'suit heriot' and 'heriot service' respectively. 'Suit heriot' is due by special contract or grant, and cannot be seized, but only distrained for, and that during the continuance of the tenant's estate [3]. 'Heriot service' is said to arise from an original creation of tenure; and it was at one time a belief that it could only be due in respect of a freehold inheritance. But the recent case of *Western* v. *Bailey* [4] shows that, at least as a matter of law, 'heriot service' may now attach to a copyhold tenement. A heriot due by service can either be distrained for, or seized [5]; and, in the latter case, it is said, even in the hands of a purchaser [6].

12. *Wardship.* The lord's right to the guardianship of an infant copyholder seems also, in spite of Blackstone's sweeping assertion [7], to depend entirely upon local custom. Rolle's doctrine [8], founded upon a statement of the Court in an unreported case of the year 1599 (*Egleton's* Case), is that 'if a copyhold descend to an infant within the age of fourteen years, the next friend to whom the land cannot descend shall have the custody of it, like as of a free tenement, unless the custom appoints it to any other.' This view was expressly followed by the King's Bench in the case of *R.* v. *Inhabitants* Wardship.

[1] *Parker* v. *Gage* (1689) 1 Shower, 81, and whether it be in or out of the manor. But he cannot distrain.

[2] *Western* v. *Bailey*, 1896, 2 Q. B. 234.

[3] *Edwards* v. *Moseley* (1740) Willes, 192.

[4] 1896, 2 Q.B. 234.

[5] *Odiham* v. *Smith* (1593) Cro. Eliz. 589.

[6] Elton, *Copyholds*, p. 199, n. The case in the Year Books (? 6 Edw. III. M. pl. 3) hardly bears out the assertion.

[7] *Comm.* (4th ed.) II. 98.

[8] 2 Rolle's *Abridgement*, 40.

of Wilby[1], in which the mother of an infant copyholder was held to have been his guardian, and, therefore, to have obtained a fixed right to occupy the tenement. It is only upon proof of express custom that the lord will be entitled to appoint a guardian[2]; but when he is so warranted, it seems that his wardship will be, on feudal principles, 'without account,' i. e. he will be entitled to retain for himself the surplus of the income, after maintaining the infant[3]. Of course this wardship, like that in military tenure, only arises in respect of infants entitled by *descent*. But it seems that the copyholder cannot dispose by Will of the guardianship of his infant heir, to the detriment of the custom[4]. The person claiming to be guardian must be admitted on the rolls for the sake of filling the tenancy; and if he will not apply for admittance, the lord may appoint a guardian for the purpose[5].

Freebench and curtesy.

13. *Freebench and Curtesy.* The right of the widow of a deceased copyholder to a provision out of his lands is usually known by the name of 'Freebench.' Its amount, and the conditions under which it can be claimed and held, are determined exclusively by the special custom, and generally differ very substantially from the widow's claim to dower out of socage lands[6], copyholds not being within the Dower Act, 1833[7]. Thus, it may attach to all the lands of which at any time during the marriage the husband has been tenant, notwithstanding that he has disposed of them during his lifetime[8]. On the other hand, a devise of copyhold lands has been held to bar the widow's claim to Freebench[9]; and

[1] (1814) 2 Maule & S. 507. [2] *Cole* v. *Walles* (1591) 1 Leon. 328.

[3] *Anonymous* (1578) 1 Leon. 266.

[4] *Clench* ('Church' in title) v. *Cudmore* (1691) Lutwyche, 1181, and 3 Levinz, 395. Doubtless, at the present day, this decision would be held to apply only to the copyhold tenement, not to the person of the heir.

[5] 11 Geo. IV. & 1 Will. IV. (1830) c. 65. §§ 3–5.

[6] As to this see post, cap. xvi. [7] 3 & 4 Will. IV. c. 105.

[8] *Riddell* v. *Gwinnell* (1841) 1 Q. B. 682. In this case the widow actually recovered one-third part of houses built on the land by purchasers from the husband.

[9] *Lacey* v. *Hill* (1875) L. R. 19 Eq. 346. It does not appear by this case whether the Freebench attached to all the husband's copyholds, or only

in equity, and therefore now at law also, a provision by way of jointure will have the same effect, even though copyholds are not within the Statute of Uses[1]. The widow, if she be entitled to Freebench in all her husband's lands, may enter and be admitted at once on his death; if in part only, her share must be assigned by the Homage[2]. But, in any case, she will hold of the lord, not of the heir[3].

A husband's claim to Curtesy out of the copyhold tenements of his wife is likewise governed entirely by local custom. But it is conceived that the recent Married Women's Property Acts[4], in cases where they apply, will be held to entitle the wife to exclude her husband's claim to Curtesy, either by surrender or Will.

Anomalous copyhold interests.

With regard to the estate or quantity of interest which a man may hold in copyhold tenure, it has been before said that this is also determined by local custom. And it appears that the rules of the common law regarding the limitation and descent of socage and other estates do not prohibit the existence of curious deviations in copyhold customs. Thus, although copyhold estates in the nature of fee simple, fee tail, for life, and for years are known, it must not be assumed that these interests resemble the analogous common law estates. Thus, for example, copyholds for lives are, in some manors, descendible as personal estate[5]; in others, copyholds for years descend to heirs[6]. In many cases the tenants of copyholds for years have a right of renewal, or nomination of their successors, which renders it very difficult

to those of which he died tenant. But the language of Sir George Jessel (p. 351) is wide enough to cover the former case.

[1] *Walker* v. *Walker* (1747) 1 Ves. Sr. 54.

[2] *Howard* v. *Bartlet* (1615) Hobart, 181, and *Walker* v. *Walker* (1747) 1 Ves. Sr. 54.

[3] Therefore she will not be allowed to dispute the title of the lord under whose admittance she claims. *Nepean* v. *Budden* (1822) 5 B. & Ald. 626.

[4] 45 & 46 Vict. c. 75 (1882); 47 & 48 Vict. c. 14 (1884); 56 & 57 Vict. c. 63 (1893).

[5] *Watkins* v. *Lea* (1802) 6 Ves. Jun. 633.

[6] *Page's* Case (1623) Cro. Jac. 671.

to bring their interests within any well-defined category. The existence of such infinite varieties of interests is a pretty clear indication of the severe system of compression which must have been applied, by the framers of the common law, in order to produce the classical symmetry of socage estates.

Limited interests in copyholds.

Great care should be taken to distinguish between interests which represent the relationship of lord and tenant, and those which represent arrangements between one tenant and another of the same copyhold tenement. The former depend entirely on custom; the latter, though restricted and limited by custom, are partly regulated by the arrangements of the parties. Thus, in a manor in which there was no custom to entail, no estate tail could, it is presumed, be created either by lord or tenant. Where such a custom existed, the tenant could not, as against his lord, convert his tenement into a customary fee simple; but as against his own issue and the copyhold remaindermen he certainly could, either by customary surrender, or by a deed executed in accordance with the provisions of the Fines and Recoveries Act, 1833[1].

Customary freeholds.

Finally, there should be noticed, in connection with copyholds, two species of tenure which are often confused with them. One is that known as *Customary Freehold*, which occurs when socage lands are known to be parcel of some definite manor, and to be subject to certain manorial incidents. This would seem to be merely a case of socage with special local incidents, and to arise from the fact that the lands have, for various reasons, preserved the character which at one time probably belonged to most socage lands, but which, in the majority of cases, has been lost[2]. The tenant of the customary freehold can usually aliene his tenement by common law

[1] 3 & 4 Will. IV. c. 74. §§ 50–54.

[2] Sir Charles Elton (*Copyholds*, 2nd ed., p. 2) tries to distinguish between freeholds modified by local custom, and those which are 'wholly supported by custom.' But the distinction appears to be unsound. All legal estates depend upon custom, general or special; and, where no special custom exists, the general will apply. No doubt, the special custom may make greater or less inroads on the general, or it may be altogether silent.

assurance; and this is the decisive mark of the freedom of the tenure. The manorial incidents of customary freehold may be commuted, by agreement or compulsion [1].

Second, there are certain manors known as 'ancient demesne,' in theory representing the lands which were *in manu regis* at the time of Domesday survey [2]. The tenants of these manors, both socage and copyhold, were entitled to various privileges, some of which long ago became obsolete, and some were repealed by the Fines and Recoveries Act, 1833 [3]. Ancient demesne.

[1] Copyhold Act, 1894, § 2.
[2] Bracton, lib. i. c. 11.
[3] 3 & 4 Will. IV. c. 74. §§ 4-6.

CHAPTER VI.

TENURE AND ESTATES FOR YEARS.

Conventionaries.

FROM very early times we read of persons who held land by agreement (*conventio*) instead of by feoffment, and for definite terms of years, instead of for life or in fee. The law did not regard them as *tenants*, for they had not that feudal possession or *seisin* of the land which a feoffee had. It treated them as contractors or 'conventionaries[1],' whose remedy for disturbance lay in a personal action against their lessors for breach of contract (*breve de conventione*).

Weakness of their position.

But a remedy of that kind is open to serious objections. In the first place, it could only be used against the lessor or his heir; a stranger would have said that, being no party to the convention, he was not bound by it. In the second, a doctrine early established itself, to the effect that a convention, to be actionable, must be under seal; and the lessee who had only word of mouth to rely upon could not use it. Moreover, the lessee could not defend himself by his convention against the guardian in chivalry of his lessor's heir, nor against his lessor's widow claiming dower.

Quare ejecit.

The earliest special remedy of the lessee for years was the writ *Quare ejecit infra terminum*. This writ seems to have been devised to meet the hard case in which the lessor had

[1] The term was used so late as the reign of Edw. III. to describe the free tenants of the Duchy manors of Cornwall, who held for terms of years upon express agreement. *Rowe* v. *Brenton* (1828) 8 B. & C. at p. 745.

alienated his interest to a stranger (perhaps with a secret trust for reconveyance), intending that the stranger should eject the lessee. Although, if the lessor still held the land, the lessee could recover it *in specie* from him by the Writ of Covenant, if the lessor had parted with the land, only damages could be recovered against him. And the alienee would, of course, deny any liability on the convention. But, by the *Quare ejecit*, a writ attributed to the authorship of William Raleigh, about the year 1235, the lessee could recover the land from a purchaser under the lessor[1]. About half a century later, the writ of *Ejectio firmae*, a special variety of the rapidly growing writ of Trespass, gave to the lessee for years an action for damages against *any* disturber; and, before Fitzherbert's time, this remedy had been improved into a restoration of the land itself[2]. And a useful clause of the Statute of Gloucester (1278) enabled the termor (as the lessee for years was frequently called) to intervene in a fictitious lawsuit got up between the lessor and a third party, to enable the latter to recover the land by a pretended hostile title, and thereby to avoid the lease[3].

Ejectio firmae.

Terms of years thus protected had evidently ceased to be mere contractual interests; and Bracton even speaks of the termor as having 'seisin' of the land[4]. But this was going too far for the average lawyer, who gradually evolved a distinction between the 'seisin' of the tenant in chivalry or socage, and the 'possession' of the termor. The chief practical disadvantage of the latter in early times was that it did not entitle the termor to use the possessory assizes;

Leasehold *estates.*

[1] Bracton (lib. iv. c. 36) treats this writ as available against all ejectors. But the form of the writ and the invention of the later *Ejectio firmae* show that, even if he were right at the time, the rule soon ceased to hold.

[2] Fitzherbert, *De Natura Brevium*, fo. 220. Fitzherbert quotes the year of the decision as 14 Hen. VII. (1498-9). The case does not seem to have been reported, but an account of it is given in Jenkins, *Eight Centuries of Reports*, p. 67.

[3] 6 Edw. I. st. I. c. 11. This remedy was improved by the 21 Hen. VIII. (1529) c. 15. § 2.

[4] Lib. iv. c. 36.

as these fell into disuse, the distinction ceased to be important on that ground. But it is still highly important in land law, in respect to limitation of future estates, as will hereafter appear[1]. And the historical origin of the term of years is marked in one or two incidents wherein it long differed strikingly from socage estates, e.g. in not qualifying for public offices, in being bequeathable by Will, in descending to the personal representatives of the termor[2] instead of to his heir, and in the forms used for its alienation[3].

Incidents contractual.

The very essence of the tenure being contractual, it naturally follows that the rights and duties of the respective parties are left to be settled by mutual agreement. And it is only in matters on which the parties are silent, that the law undertakes to construe the relationship of lessor and lessee for years. Nevertheless, when holding for years became a tenure, it was almost inevitable that certain conditions should become annexed to it in the minds of lawyers; and, accordingly, we find that there are a few incidents regarded by the law as essential to every term of years, unless they are expressly excluded by agreement.

Demises.

Before proceeding to these in detail, however, it will be well to make one important reservation. The terms of years to which these incidents apply are terms created by demises properly so called, and not terms created by way of use. Much confusion has arisen through failure to observe this distinction. Terms of years created by way of use do not constitute the relationship of lessor and lessee, nor are they subject to the normal incidents of terms of years. Their nature and incidents will be explained when we come to deal with the famous Statute of Uses[4]; at present they may be put quite out of sight. Although the word 'demise' is not

[1] Post, cap. vii.

[2] This seems not to have been an original feature of the term of years. See work cited in next note, vol. II. p. 115.

[3] Upon the whole subject of the origin of terms of years see Pollock and Maitland, *History of English Law*, vol. II. pp. 105–17.

[4] 27 Hen. VIII. (1535) c. 10.

essential to the creation of a term of years—such words as 'grant' and 'let' being sufficiently, though not equally[1] efficacious—yet, in order to create a term of years to which the ordinary incidents of leasehold tenure will apply, it is necessary that the parties should clearly intend to constitute the relationship of landlord and tenant between themselves.

This being premised, the incidents attached by law to a leasehold interest may be stated as follows:—

1. *Fealty*, which, of course, is now rarely, if ever, exacted; but which, in theory, is due from every tenant for a fixed term of years[2]. Fealty.

2. *Term of years.* It was the original, and still is an essential feature of tenancies for years, that they should begin and terminate upon fixed calendar dates[3]. If nothing is specified, it will be presumed that the term is intended to commence at the time of its creation; and it is immaterial that there is an implied agreement for renewal, as in a tenancy from year to year. Nor does it matter that a term of years may be determinable upon the happening of an uncertain event, e. g. a term to *A* for ninety-nine years if *B* shall so long live. It is merely necessary that there shall be a fixed calendar date beyond which the term cannot last. If there is not, the interest, if anything, is a socage or copyhold estate; or it is one of those so-called 'minor terms,' e. g. 'at will' or 'on sufferance,' which are not tenancies at all, but merely permissive occupations, determinable at any moment, and inalienable by the occupier. Term.

3. *Necessity for entry.* Until actual entry, the lessee has no possession, and, consequently, no estate; he has merely an *interesse termini*, which he can enforce against the lessor[4]. Entry.

[1] It will be seen hereafter that the word 'demise' is necessary to imply covenants for title. The orthodox phrase originally was—*demisi concessi et ad firmam tradidi.*

[2] Co. Litt. 93 a. b. [3] Bracton, lib. ii. c. 9. (fo. 27); Co. Litt. 45 b.

[4] ib. 46 b. He can also grant over the right to another (independently of the Judicature Acts). *Bruerton* v. *Rainsford* (1583) Cro. Eliz. 15; and he can enforce his right against the lessor's executors (Co. Litt. 51 b). If the lessee die before entry, his executors can enter (ib. 46 b).

This entry, which was the medieval substitute for the acceptance of seisin by the socager, was very important when terms of years, however long, could be created by word of mouth. It is still essential to the recovery of the land *in specie*.

Rent. 4. *Rent.* It was an essential of all true tenure that the tenant should render services or value of some kind, and of tenure by lease for years as well as other. In this case, from the very first, a money rent was usually fixed; and money rents are now almost universal in terms of years. When a rent represents the full market value of the premises demised,

Rack rent. it is called a 'rack rent'; and the term is technical[1]. When it represents only the value of land, upon which buildings

Ground rent. have been constructed by the tenant, it is called a 'ground rent.' When by custom, or as the result of payment of a fine by the lessee, the rent reserved does not represent the full value of what the lessee is getting, it, or the lease by which

Beneficial rent. it is reserved, is called 'beneficial.' The amount of rent payable may vary from year to year; as in the case of mining rents. But the circumstances which decide it must be fixed by the lease.

Distress. 5. *Distress.* This incident is, as we have seen, common to socage and copyhold tenure; but certain recent statutory provisions have made important modifications in the law of distress for rent, and as, in nine cases out of ten, a distress

Modern statutes. for rent is made in respect of a term of years, it will be most convenient to state them here.

1689. (i) 2 *W. & M. st.* I. *c.* 5. In spite of the doubtful expressions of an early statute, it seems to be agreed that, until the Restoration, a landlord, although entitled to seize his tenant's goods for arrears of rent, could only hold them as a pledge. By this statute, however, of the year 1689, he was authorized, in the event of the goods not being replevied by the tenant within five days, to have them appraised, i. e. valued by experts and sold in satisfaction of his claim, handing

[1] Cf. e. g. 14 & 15 Vict. (1851) c. 25. § 1.

over the surplus, if any, to the sheriff for the benefit of the owner[1]. The necessity for appraisement has been abolished by recent statutes; and the form of procedure slightly altered. But the rule of 1689 is still in force.

(ii) *The Lodger's Goods Protection Act*, 1871. Broadly speaking, a landlord may seize by way of distress any goods which he finds on the tenant's holding, whether they belong to the tenant or not. But, by this statute, a lodger may protect his goods from distress for his landlord's default, by paying to the latter's landlord any rent which he (the lodger) may owe to his immediate landlord[2]. 1871.

(iii) *The Agricultural Holdings Act*, 1883. In the case of an agricultural tenancy, whether for life or years, the lessor cannot distrain for more than one year's arrears of rent, nor can he distrain agricultural machinery, not belonging to the tenant, which is *bona fide* employed on the land in the conduct of the tenant's business. Moreover, he cannot seize any live stock belonging to a stranger which is on the land as the result of a *bona fide* agreement for feeding, so long as there is a sufficiency of other distrainable articles. And, even if he does seize such stock, its owner is entitled to redeem it on payment of the sum due from him for the feeding[3]. 1883. Agistment.

(iv) *The Bankruptcy Acts*, 1883 *and* 1890. By the combined effect of these statutes, a landlord who distrains upon his tenant after the commencement of the latter's bankruptcy, is restricted to the recovery of six months' arrears from the date of the order of adjudication[4]. 1883 and 1890.

Various statutes have also made important changes in the procedure to be adopted in levying a distress[5]; but these do not fall within the scope of the present work.

6. *Waste.* The termor was early made liable for positive acts of Waste by express statutory provisions. The statutes Waste.

[1] 2 W. & M. (1689) st. I. c. 5. § 2.
[2] 34 & 35 Vict. c. 79. § 1.
[3] 46 & 47 Vict. c. 61. §§ 44, 45.
[4] ib. c. 52. § 42; 53 & 54 Vict. c. 71. § 28.
[5] e. g. the Law of Distress Amendment Acts, 1888 and 1895 (51 & 52 Vict. c. 21; 58 & 59 Vict. c. 23).

of Marlbridge and Gloucester[1] specified the remedy of forfeiture and threefold damages; but this remedy, as previously explained[2], has now become modified into the claim for single damages and an injunction. With regard to permissive Waste, the rule is by no means so clear. The words of the Statute of Marlbridge are 'make Waste[3].' And there is a good deal of force in the contention that, if a landlord wishes to impose upon his tenant the positive duty to repair, he must provide accordingly in the lease. It has, however, been held, in two fairly recent cases, that a power conferred by a settlement upon a limited owner to grant leases, but so that the same did not contain exemptions from Waste, was not well exercised by the grant of a lease which implicitly exempted the tenants from permissive Waste[4]. And so we must conclude that a tenant for years is, to some slight extent at least, responsible for repairs.

Accidental fire.

An important statute of the year 1774[5], relieves from responsibility the person 'in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall (after June 24, 1774) accidentally begin,' for any damages in respect thereof. And, presumably, this section would, in the absence of agreement, exempt a tenant for years from claims for non-repair after a fire[6]. In the matter of Waste, a lessee for years is responsible for the acts of his undertenant, although done against his will, unless the lessor have recognized the undertenant[7].

Emblements.

7. *Emblements.* In the ordinary case of a term of years, the lessee has no claim to crops sown by him, unless he reaps

[1] 52 Hen. III. (1267) c. 23; 6 Edw. I. (1278) c. 5. [2] Ante, p. 41.

[3] 'Shall not make Waste or exile of goods, houses, or men, nor of anything belonging to the tenements.'

[4] *Yellowly* v. *Gower* (1855) 11 Exch. 274; *Davies* v. *Davies* (1888) 38 Ch. D. 499.

[5] 14 Geo. III. c. 78. § 86.

[6] What if the fire did not begin in his house, but spread from another?

[7] *Henderson* v. *Squire* (1869) L. R. 4 Q. B. 170. This was an action for non-delivery of possession; but the reasoning would apply exactly to the case of Waste.

them during the continuance of the term, 'because the lessee knew the certainty of his tenure and when it would end[1].' But in the case of a so-called tenancy at will, if the tenant's occupation is put an end to by the lessor, and in the case of a term, lawful at the time of its creation, if it is subsequently determined without fault of the lessee, the latter will have a right to *emblements*[2]. The commonest case is, or was, the case of a tenant for years under a lease granted by a tenant for life, who had no special powers of leasing, which lease determined by the death of the lessor. The statute of 1851[3], however, which provides that such a tenant shall hold until the expiry of the current year of tenancy, applies in all cases in which a farm or lands are held at rack rent, and the lessor's interest determines by the death of the landlord or cesser of his interest[4].

Fixtures.

With regard to the analogous matter of fixtures, the tenant for years stands, apart from recent legislation, much in the same position as that occupied by the tenant for life at the common law[5]. The general rule holds good, that nothing 'fixed' by the tenant to the land demised can be again removed by him without the consent of the persons entitled to the inheritance. But the course of decisions has gradually established that (1) articles set up for the convenience of trade[6], and removable without serious damage to the inheritance[7], (2) articles affixed for the purposes of ornament and furniture, and similarly removable[8], may be taken away by the tenant during the continuance of his term. Where the tenant's interest is uncertain, and is determined by an event over which he has no control, he is allowed a reasonable time thereafter in which to exercise his rights[9]. The much more

[1] Co. Litt. 55 a. [2] ib. 55 b. [3] 14 & 15 Vict. c. 25. § 1.

[4] Presumably, however, the statute would not apply where the landlord's interest was not 'uncertain'; e. g. where a man holding for fifteen years sublet for twenty.

[5] See ante, pp. 45–7. [6] *Poole's* Case (1703) 1 Salk. 368.

[7] *Lawton* v. *Lawton* (1743) 3 Atk. at p. 15.

[8] *Avery* v. *Cheslyn* (1835) 3 A. & E. 75.

[9] *Pugh* v. *Aston* (1869) L. R. 8 Eq. 626.

liberal rules laid down by the Agricultural Holdings Act, 1883[1], and rendered necessary by the decision in *Elwes* v. *Maw*[2], will be noticed in their proper place[3].

Warranty. 8. *Warranty.* The character of the original lease for years, as a covenant binding the heirs of the lessor, survives in the modern doctrine that, whether the lease in fact contains any express covenants or no, the lessor is held to have entered into certain covenants for the benefit of the lessee. The doctrine has been the subject of some misunderstanding; but a careful study of the authorities, especially of the judgement of the present Chief Justice in the case of *Baynes* v. *Lloyd*[4], seems to show that the following three points may be considered as fairly established:—

Expressum facit cessare tacitum. (i) *That when the lease contains any express covenants, these will limit and overrule any covenant which would otherwise be implied by law from the use of technical terms, or the existence of the relationship of landlord and tenant.* This rule, which is but an application of the general principle of construction—*expressum facit cessare tacitum*—applies equally when the terms agreed upon by the parties are to be gathered from the general tenour of the document, and when they are stated *totidem verbis.* In both cases they are 'express' covenants, as opposed to covenants 'in deed,' or implied by law[5].

Quiet enjoyment. (ii) *That, when there is no such express covenant, the mere fact of the relationship implies a covenant on the part of the lessor for quiet enjoyment of the premises by the lessee, but limited to the continuance of the lessor's interest.* This last was the actual point decided in *Baynes* v. *Lloyd*[6]. There the defendants, owners of a term of years in a warehouse, sublet part of it to the plaintiffs, for a term which in fact exceeded their own

[1] These have virtually superseded the more restricted provisions of the 14 & 15 Vict. (1851) c. 25. § 3.

[2] (1802) 3 East, 38.

[3] Post, pp. 86–7.

[4] 1895, 1 Q. B. 802; 2 Q. B. 610.

[5] *Williams* v. *Burrell* (1845) 1 C. B. 402. The whole of the admirable judgement of Tindal, C. J. should be carefully read.

[6] 1895, 1 Q. B. 802; 2 Q. B. 610. *Hall* v. *City of London Brewery Co.* (1862) 2 B. & S. 737.

interest in the premises. They acted *bona fide*, under a mistaken impression of the facts. At the end of the defendants' term, their landlord ejected the plaintiffs, as, of course, he had a perfect right to do. The plaintiffs sued the defendants on the implied covenant for quiet enjoyment; but they were defeated, on the ground that the defendants' interest in the premises had ceased before the plaintiffs were disturbed. In other words, the implied covenant only extended to disturbance by the lessors.

Title.

(iii) *Where the word 'demise' is used, there is also implied (unless corrected by express covenant) a covenant* FOR TITLE, i. e. *a covenant that the lessor has good right to demise the premises, in manner, and for the term contained in the lease.* This covenant can be sued upon by the lessee the moment he discovers that in fact the lessor's title is bad, whether he has been disturbed in his actual enjoyment, or not [1]. It seems to be now settled that, in a successful action for breach of covenant (in deed or in law) for quiet enjoyment, the plaintiff will be able to recover the value of the term which he has lost [2]. The measure of damages for breach of covenant for title, when the plaintiff has not actually been ejected, appears to be somewhat unsettled [3].

Estates in leasehold.

With regard to the *estates* which may be held in leasehold tenure, these are infinitely various, as the duration of the term in each case is fixed by the agreement of the parties, or implied by law from their conduct. And as no special words of limitation are, or ever were, necessary to the creation of a term of years, there are no technical rules of construction to help us to a classification. It is purely as a matter of usage and convenience that leases for years (excluding the long

[1] *Holder* v. *Taylor* (1613) Hobart, 12.

[2] *Williams* v. *Burrell* (1845) 1 C. B. 402. The existence of this rule is the more necessary, that upon a contract to grant a lease, however great the outlay of the intending lessee, the latter cannot (in the absence of express stipulation) insist on examining the lessor's title. (Vendor and Purchaser Act, 1874, § 2; Conveyancing Act, 1881, § 13.)

[3] See Mayne, *Damages*, 2nd. ed., p. 143.

terms created under the Statute of Uses) are grouped under the three heads of Building Leases, Mining Leases, and Occupation Leases. Under the last head are included those minor interests which are not, as has been observed, really estates at all.

Building leases.

1. *Building Leases*, which are usually made for periods varying between eighty and ninety-nine years, are granted partly in consideration of an annual 'ground-rent,' representing the value of the land, and partly in consideration that the lessee has built or agreed to build, upon the land, certain buildings which, at the end of the term, will become the property of the lessor. The latter fact need not be stipulated for. It being an act of Waste on the part of the lessee to pull down buildings, or even to let them go to ruin, the lessor will be entitled, at the expiry or determination of the term, to claim all buildings on the land. It is this rule of law which makes 'ground rents' such a valuable form of investment. Not only will the lessor enjoy almost perfect security for his rent, by reason of the fact that the tenant will run the risk of forfeiting his buildings if he fails to pay; but, at the natural expiration of the term, the lessor or his representatives will probably obtain a large increase of income by assuming possession of the buildings. But it is this liability on the part of the lessee to forfeit his (perhaps) costly buildings, which renders the new statutory provisions on the subject of forfeiture of leases so specially important in the case of building leases. But these will be dealt with hereafter[1]. The only other point which it seems necessary to touch on is as to the rights conferred on the lessee by a building lease. And here it seems to be the rule that a lease, unlike a conveyance in fee, only confers rights in the surface of the land, unless a contrary intention should appear. Thus, it has been decided by Mr. Justice North[2] that the lessee for a term of 999 years has no right to dig indiscriminately below the surface of his land, although he may dig the necessary foundations for

[1] Post, cap. xiii. [2] *Robinson* v. *Milne* (1884) 53 L. J. N. S. Ch. 1070.

buildings actually contemplated by the lease. And, in the interesting case of *Elwes* v. *The Brigg Gas Co.*[1], it was ruled that a colliery company, holding under a building lease for ninety-nine years which authorized them to dig foundations, were not entitled to retain for their own benefit (even during their term) a prehistoric boat discovered in the course of their lawful excavations. It is true that, in both these cases, there was an express reservation in the lease of mines and minerals; but, in neither case, did the lessee claim minerals.

Mining leases.

2. *Mining Leases.* Here, on the other hand, it is clearly the intention that the lessee shall have rights in the sub-soil, but not in the surface, except so far as may be necessary to enable him to reach and work the sub-soil. The term of a mining lease does not usually exceed sixty years, and the rent is usually made to vary according to the quantity and value of the minerals gotten, with a 'dead' or fixed minimum rent. But the whole subject is too technical to be dealt with in detail in a general work.

Occupation leases.

3. *Occupation Leases* are rarely for more than twenty-one years, except on Crown and Corporation lands, where it is, or was, customary to grant leases for a somewhat longer period on payment of a fine. Here also the rule largely prevails, that the parties fix their own terms and conditions; but one or two points specially relative to occupation leases have been established by statute and judicial decision, and these it will be well to enumerate here.

Game.

(i) *Destruction of Game.* By the Ground Game Act, 1880[2], it is provided that, notwithstanding any agreement to the contrary, the occupier of land may, by himself and the resident members of his household and one other person, all duly authorized in writing by him, kill any hares and rabbits which are upon the land occupied by him. But only the occupier himself and one other person may use fire-arms for the purpose; the object of the statute being to authorize the destruction of game for the encouragement of agriculture,

[1] (1886) 33 Ch. D. 562.

[2] 43 & 44 Vict. c. 47.

not to enable occupiers of land to give shooting-parties. The rights conferred by the Act are exercisable concurrently with the rights of any other persons entitled to kill game on the land. Apparently, it applies to all land, whether agricultural or not, except to open and uninclosed moorlands exceeding twenty-five acres [1]. But the occupier claiming to destroy game by virtue of the Act must not do so at night, nor may he use poison or other illegitimate methods, nor violate the close seasons established by any Act of Parliament which was in force on September 7, 1880 (the date of the passing of the Act). He requires a gun- but not a game-licence.

Improvements.

(ii) *Compensation for Improvements.* By the Agricultural Holdings Act, 1883 [2], a tenant of agricultural or pastoral land [3] who has effected on his holding any of the numerous improvements specified in the first Schedule to the Act, and who has complied with the provisions of the Act as to obtaining the landlord's consent or giving notice [4] which apply to certain cases, is entitled, on the determination of his tenancy, to obtain from his landlord compensation for such improvements, to an extent which fairly represents the value thereof to an incoming tenant [5]. Careful provision is made by the Act for the assessment of such compensation, and the landlord, if himself only a limited owner, may obtain from the County Court an order charging the amount upon the land; and capital money arising under the Settled Land Act, 1882 [6], may be applied in discharge thereof [7]. Moreover, an agricultural tenant may remove any fixture or building put

[1] On these the occupier's rights may only be exercised from December 11 to March 31 (§ 1. (3).).

[2] 46 & 47 Vict. c. 61.

[3] The terms are not technical. But the Act does not apply to any land 'that is not either wholly agricultural, or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden' (§ 54).

[4] In the case of improvements which require notice, the landlord may, if he prefer, execute them himself, and charge the tenant with a percentage on the outlay as increased rent (46 & 47 Vict. c. 61. § 4).

[5] ib. § 1. [6] 45 & 46 Vict. c. 38.

[7] 46 & 47 Vict. c. 61. §§ 7-28.

up by him during his tenancy, and for which he is not entitled to compensation [1]; subject to the landlord's right to purchase it at a valuation [2].

The Act applies to tenancies for life and years, and not only to occupying tenants [3]; but, inasmuch as a tenant must himself have made the improvements or erected the fixtures, in order to claim compensation or removal, or at least must have paid for them as an incoming tenant [4], a mention of the Act seems to come naturally in this place. To enable a tenant to claim for improvements (other than manures) they must have been effected within one year of the termination of his lease [5]. The provisions of the Agricultural Holdings Act have been partly modified in relation to market gardens by the Market Gardeners' Compensation Act, 1895 [6]. Generally speaking, and subject to very slight exceptions, the provisions of the Act cannot be excluded or modified by the parties to a tenancy [7].

Market Gardens.

By the *Allotments and Cottage Gardens Compensation for Crops Act*, 1887 [8], the tenants of small plots of land (not exceeding two acres), which are cultivated as gardens or farms, are entitled, upon the determination of their tenancies, to obtain from their landlords compensation, to be assessed in a summary way, for crops and fruit, and, if planted with the consent in writing of the landlord, for fruit trees, and for labour and manures expended since the last crop, as well as for drains and buildings made with a similar consent. This Act supersedes the Agricultural Holdings Act in the cases to which it applies.

Allotments.

(iii) *Sanitary condition of premises.* Although, as a general rule, there is no warranty of the suitability of demised premises for the purpose for which they are required by the

Sanitary condition.

[1] As regards agricultural tenancies other than market gardens, this clause only applies to fixtures and buildings *voluntarily* put up by the tenant.

[2] 46 & 47 Vict. c. 61. § 34. [3] ib. § 61.

[4] ib. § 56. The consent of the landlord must (except in the case of market gardens) have been obtained to this payment.

[5] ib. § 59. [6] 58 & 59 Vict. c. 27.

[7] 46 & 47 Vict. c. 61. §§ 55 and 5. [8] 50 & 51 Vict. c. 26. § 18.

lessee[1], there has been engrafted on this rule an important exception in respect of houses taken furnished for immediate occupation. Two modern decisions[2] lay it down that, in these cases, the lessee, especially if he has not inspected the premises, or if the defect was one which inspection would not have discovered, is entitled to repudiate the lease if the premises turn out to be actually unfit for occupation.

Short terms.

One particular example of the estate for years deserves special mention, both on account of its peculiarities and of its importance. This is the so-called 'yearly tenancy,' or tenancy 'from year to year.' Its existence will be recognized, not only where the parties expressly stipulate for it, but where by their conduct they have placed themselves in the relation of landlord and tenant without adopting any other term. Thus, if the tenant of an expired term has been *allowed*[3] by his landlord to remain after the expiry of his term, in such a way as to preclude the possibility of treating him as a mere tenant on sufferance, he will be deemed to be a tenant from year to year[4]. So also, if a tenant has occupied under a lease *de facto* void[5], and which cannot be construed as a contract to grant a longer term[6].

Yearly tenancy.

No permissive Waste.

Notice.

The tenancy differs from an ordinary estate for years in two important points. In the first place, the tenant is not liable for permissive Waste[7]. In the second, the tenant (and

[1] *Sutton* v. *Temple* and *Hart* v. *Windsor* (1843) 12 M. & W. 52, 68. The word 'demise' was, apparently not used in either of these cases nor in the two following.

[2] *Smith* v. *Marrable* (1843) 11 M. & W. 5 (bugs); *Wilson* v. *Finch-Hatton* (1877) 2 Exch. D. 336 (drains).

[3] The landlord must have definitely recognized him as a tenant after the expiry of the term. Otherwise he will be liable to the penalties of 'holding over' (4 Geo. II. (1730) c. 28. § 1), or at least will be a mere 'tenant on sufferance' (11 Geo. II. (1737) c. 19. § 18).

[4] *Hyatt* v. *Griffiths* (1851) 17 Q. B. 505. And the terms of the old lease will, so far as applicable, be extended to the new holding.

[5] *Ecclesiastical Commrs.* v. *Merral* (1869) L. R. 4 Exch. 162.

[6] *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9. If it can be so construed, the lessee will be tenant for that term.

[7] *Torriano* v. *Young* (1833) 6 C. & P. 8. In a slightly earlier case, Tenterden, C. J. thought that a tenant from year to year was liable to

probably also the landlord) is entitled to a notice of half a year, *expiring at the end of a current year of holding*, as a condition of terminating the tenancy[1]. And, in holdings to which the Agricultural Holdings Act, 1883, applies, a year's notice, expiring similarly, is now required in all cases in which six months' notice was necessary and sufficient at the date of the passing of the Act[2], unless the landlord and tenant agree in writing to the contrary[3]. Notwithstanding the leaning of the law in favour of the yearly tenancy, it has been decided that a tenancy 'for twelve months certain and six months' notice afterwards' only made the term for one year certain, and that a six months' notice, expiring at the end of the first twelve months, was valid to put an end to the tenancy[4]. Probably there was no legal necessity in such a case to give any notice at all[5].

The two minor interests, known respectively as tenancy at will and tenancy on sufferance, are not really estates in land at all. They cannot be transferred or inherited; no action can be brought to recover them. It is doubtful whether they confer any rights; though one of them, at least, imposes duties. But, as they result in the occupation of land, it is usual to speak of them in connection with terms of years, the smallest interest in land known to the law.

Tenancy at will.

(i) *Tenancy at will*, though not favoured by law, will be held to exist where the parties have evidently attempted to constitute the relationship of landlord and tenant, with a stipulation, express or implied, that either party may put an end to it at any time[6]. But if the terms of the lease positively mention a tenancy 'from year to year,' a proviso that the tenancy may

keep a house 'wind and water tight.' *Auworth* v. *Johnson* (1832) 5 C. & P. at p. 241.

[1] *Morgan* v. *Davies* (1878) 3 C. P. D. 260. [2] August 25, 1883.

[3] 46 & 47 Vict. c. 61. § 33. But the extension does not hold good where the tenant has become avowedly insolvent.

[4] *Thompson* v. *Maberly* (1811) 2 Camp. (ed. 1818) 572.

[5] See dictum of Bayley J. in *Johnstone* v. *Hudleston* (1825) 4 B. & C. at p. 937.

[6] *Morton* v. *Woods* (1868-9) L. R. 3 Q. B. 658; 4 Q. B. 293.

be determined at pleasure by one party will not convert it into a tenancy at will[1]. A well-known comment of Coke has been assumed to lay down the rule that a tenancy cannot be made to determine at the will of one party only[2]; but this construction was repudiated by Lord Justice Cotton in the case of *In re Threlfall*[3], which, indeed, decided that such a tenancy was lawful. It must be remembered that, by the Statute of Frauds, all interests in land (with certain exceptions) attempted to be created without writing, are to have the 'force and effect' of estates at will only[4]. The Act to Amend the Law of Real Property provides that all assurances made with the object of creating such interests shall be void *at Law* unless made by deed[5]. But it is assumed that any one taking possession of land under such an assurance would become a tenant at will.

Notice. A tenant at will is not entitled to notice of the landlord's intention to terminate the tenancy; a mere demand of possession will be sufficient[6], or any act, e.g. conveyance of the reversion to a stranger[7], from which an intention to terminate can be reasonably inferred. But a tenant at will whose occupation is so disturbed is entitled to *emblements*[8]. A tenant at will is not liable for Waste, because he is not within the statutes; but the commission of Waste would probably be held to determine the tenancy, and convert the tenant into a trespasser[9]. If a definite rent has been agreed upon, the landlord may distrain for it[10]; if not, the landlord will be able to recover by action the estimated value of the 'use and occupation,' unless the circumstances show an inten-

[1] *In re Threlfall* (1880) 16 Ch. D. 275.
[2] Co. Litt. 55 a.
[3] (1880) 16 Ch. D. at p. 282.
[4] 29 Car. II. (1677) c. 3. § 1.
[5] 8 & 9 Vict. (1845) c. 106. § 3.
[6] *Tomes* v. *Chamberlaine* (1839) 5 M. & W. 14.
[7] At least if the tenant knows of it. *Davies* v. *Thomas* (1851) 6 Exch. 854.
[8] Co. Litt. 55, a. *Kingsbury* v. *Collins* (1827) 4 Bing. 202. Probably the tenant at will could never qualify himself to claim under the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25. § 1).
[9] *Harnett* v. *Maitland* (1847) 16 M. & W. 257.
[10] *In re Threlfall* (1880) 16 Ch. D. 275; *Anderson* v. *the Midland Railway Co.* (1861) 3 E. & E. 614.

tion to create a gratuitous holding[1]. A very important section of the Real Property Limitation Act provides[2] that, for the purpose of reckoning the statutory period, a tenancy at will shall be deemed to expire at the end of one year from its creation, unless actually before determined.

Tenancy on sufferance.

(ii) *Tenancy on sufferance* occurs where a man, having occupied land by a lawful title, continues to hold after his title has expired[3]. He cannot be treated as a trespasser, until a demand of possession has been made; because his entry was lawful. But if he 'holds over' after demand in writing, he is liable for double the value of the lands so long as he detains them[4]. None of the ordinary incidents of an estate for years applies to such an occupation; but acceptance of rent by the landlord would probably convert it into a yearly tenancy, commencing at the date on which the holding ceased to be lawful[5].

[1] *Smith* v. *Eldridge* (1854) 15 C. B. 236.
[2] 3 & 4 Will. IV. (1833) c. 27. § 7.
[3] Co. Litt. 57 b.
[4] 4 Geo. II. (1730) c. 28. § 1; 11 Geo. II. (1737) c. 19. § 18.
[5] *Hyatt* v. *Griffiths* (1851) 17 Q. B. 505.

CHAPTER VII.

INCORPOREAL HEREDITAMENTS. I. ESTATES IN FUTURO.

HITHERTO we have been treating exclusively of interests in land which confer possession on the persons in whom they are vested. This course was both inevitable and desirable; inevitable, because it is almost impossible for the student to grasp the difficulties of incorporeal hereditaments until he is thoroughly impressed with the characteristics of estates in possession, desirable, because the first thing that the student has to remember about our land law is that, in the beginning, it recognized one person only, the person feudally possessed, or seised, and, therefore, the interest of that person colours all its rules. Even the tenant for years was, as we have seen, but slowly admitted to the category of the owners of *estates*; for his possession was not feudal, only 'conventionary.'

But now we must remember that our land law has for many centuries also recognized interests in land which do not fulfil the requirements of a legal estate in possession, or 'corporeal hereditament.' And these interests, which in other respects differ greatly among themselves, are all characterized by the negative quality that they do not confer present possession, and by the consequence, resulting from it, that they have never required (or even been capable of) livery of seisin. The distinction used to be expressed by saying that corporeal hereditaments 'lay in livery,' and incorporeal hereditaments 'in grant.' But this definition is open to the

objection that all corporeal hereditaments did not necessarily *require* livery for their transfer; nor did all incorporeal hereditaments require a grant. And, as we shall hereafter see, the distinction was formally abolished in 1845[1], after having for two centuries ceased to represent the actual facts.

Classes of Incorporeal Hereditaments.

Incorporeal hereditaments may conveniently be discussed under three classes. First, there are those future interests which, though they do not now confer possession, will some day, in the normal course of things, do so, and may, therefore, without much impropriety, be termed *estates*. Second, there are those equitable interests which, though not as of right conferring possession, may, at the discretion of the Court, be allowed to do so[2]; and, third, there are those limited rights over land, for which a good collective name is 'servitudes,' but which the English law knows only as 'casements and profits.' These last, in the nature of things, never can confer possession upon the persons in whom they are vested (except, temporarily, by way of legal remedy for recovery of them); and, therefore, they are sometimes called 'hereditaments purely incorporeal[3].'

Estates *in futuro*.

In the present chapter we shall deal exclusively with the first class of incorporeal hereditaments, viz. estates *in futuro*. And these fall naturally into two subdivisions, (*a*) estates *in futuro* at the common law, (*b*) estates *in futuro* under the Statute of Uses, or, as they are often called, 'executory interests.'

(*a*) Estates *in futuro* at the common law fall again into one of two categories—*Reversions* and *Remainders*.

[1] 8 & 9 Vict. (1845) c. 106. § 2 (Act to amend the Law of Real Property).

[2] The writer is glad to have the high authority of the late Mr. Challis (*Real Property*, 2nd ed., p. 45) for including equitable interests under the head of Incorporeal Hereditaments. Since the passing of the Judicature Acts, the classification has been inevitable, and, in the interests of simplicity, desirable. But the writer does not follow Mr. Challis in excluding life interests from the category of hereditaments. Philological purism must give way to practical convenience. As to equitable interests and possession, see post, cap. viii.

[3] e. g. by Williams, *Principles of the Law of Real Property*, 17th ed., part ii. cap. 5.

Reversions.

A *reversion* arises by operation of law when the person in whom an estate is vested creates out of it a smaller, or 'particular' estate in the same land, which itself carries seisin[1]. Thus, if *A*, seised in fee simple, convey to *B* for life, *A*, without any express words, will be deemed to have a 'reversion in fee,' by virtue of which the land will revert to him or his heirs after the death of *B*. If he have reserved rent or services from *B*, the rent and services will be 'incident to the reversion,' and pass by a conveyance of it. But *A* will no longer be 'seised' of the land; though he may be said to be seised of the rent and services. His interest will be a *reversion*.

The 'particular' estate.

It should be noted very carefully that, to make a true reversion at the common law, it is necessary that the particular estate should be an estate carrying seisin. It must be an estate; e.g. the mere grant of a rent charge or the creation of an equitable interest by the tenant in fee would not make him a reversioner. He would still be seised in fee, subject merely to an incumbrance. It must also be an estate carrying seisin. A grant of an estate for years, however long, does not destroy the seisin of the lessor, though it deprives him of actual possession. He is still seised, not merely of a rent, but of the land. Before the Statute of Uses, he would have had to convey by livery of seisin, the lessee for years attorning to the feoffee. It is true that, as regards the lessee for years, he is a reversioner; but, as regards the community at large, he is deemed to be in possession, at least for most purposes. So also, the lord of a copyhold tenement is deemed to be seised, although he may never obtain actual possession of the land[2].

Remainders.

A *remainder*, on the other hand, arises by the act of the parties; and occurs when, after the limitation of a particular estate, another estate is limited by the same instrument to come into possession after the determination of the particular

[1] Co. Litt. 22 b.

[2] But, if the tenant in customary fee of a copyhold surrender to the use of *A* for life, he becomes a reversioner, because he has parted with the customary seisin.

estate. Thus if *A*, seised in fee simple, convey to *B* for life, 'and from and after the determination of *B*'s estate, to *C* and the heirs of his body,' *C* will be said to have an estate tail in *remainder*, expectant on the death of *B*[1]. And the reversion will still, as in the former case, be vested in *A*; but in this case it will be expectant, not on the death of *B*, but on the failure of the issue of *C*. It will, of course, be liable to be destroyed by a disentailing assurance duly executed by *C*, under the provisions of the Fines and Recoveries Act, 1833[2].

Rules for the creation of remainders.

The practice of creating remainders is as old as the thirteenth century, at the least[3]; and the vista of possibilities opened up by it became so tempting to the vanity of the landowner and the ingenuity of the conveyancer, that the Courts have had to lay down certain definite rules affecting their limitation. It is in these rules that the chief difficulty of the subject is found. An attempt must therefore be made to state them briefly and intelligibly.

1. Particular estate of freehold to support.

(i) *Every remainder of freehold must have a particular estate of freehold limited immediately before it, on the determination of which it is to come into possession*[4]. This rule is merely an application of the fundamental principle of feudal land law, that the seisin must never be 'in abeyance' (i. e. non-existent). It was of the essence of feudalism that the public, and individuals, should be able at any moment to identify the feudal representative of any piece of land, in order that claims against the land, public or private, might be immediately enforceable. But every creation of a freehold was,

[1] Co. Litt. 143 a.

[2] 3 & 4 Will. IV. c. 74. It should be carefully noted, that there is no *tenure* between the particular tenant and the remainderman. Therefore, any reservation of rent in favour of the remainderman would create a rent charge, or incorporeal hereditament only. Rent service can only be incident to a reversion. (Co. Litt. 143 b.)

[3] See examples quoted by Professor Maitland (*Law Quarterly Review*, vol. ii. pp. 22–6).

[4] *Buckler's* Case (1597) 2 Rep. 55; *Barwick's* Case (1597) 5 Rep. 93; *Hogg* v. *Cross* (1591) Cro. Eliz. 254. All these cases merely decide that a freehold limited to commence at a future day is void. But the rule is a necessary deduction, or remainders could not exist.

at the common law, by feoffment with livery, which divested the feoffor of his seisin. If, therefore, the seisin did not pass at once to the feoffee, (as in a remainder, *ex hypothesi*, it could not), the seisin would fall into abeyance, i. e. would be vested in no one. Which was just what the feudal law desired to avoid. So it condemned unhesitatingly any attempt to 'limit a freehold *in futuro*'; and the phrase, though somewhat ambiguous, has become classical. Thus, a feoffment to *B* to commence from a future date was absolutely void[1]. And any attempt to fill up the hiatus by a term of years was equally void; for the seisin could not be in the feoffor, because he had delivered it, nor in the feoffee because his estate was not yet in possession, nor in the termor, because a man could not be seised of a term of years[2]. But there would seem to be no objection to a man creating a particular estate by one instrument, and then subsequently limiting an estate to take effect on determination of that estate. Thus, if *A*, seised in fee simple, convey to *B* for life; and, a year later, during *B*'s life, limit to *C* and the heirs of his body from the death of *B*, this will not be an attempt to create a freehold *in futuro*, because the seisin is already in *B*. But *C*'s estate will not be a remainder on *B*'s, because it was not created by the same instrument. If the particular estate of *B* were for years, instead of for life, *A* would, of course, still be seised, and the limitation to *C* and the heirs of his body would give *C* an estate tail in possession (seisin), subject to the term of years in *B*.

Similarly, a person having an estate in remainder may create out of it any smaller estates; and the seisin which

[1] *Hogg* v. *Cross* (1591) Cro. Eliz. 254.

[2] Where, however, the feoffor gave livery of seisin to the tenant for years on behalf of the remainderman, this would operate as an immediate creation of a freehold (Co. Litt. 49 a). And so also where the legal estate would pass without livery of seisin, e. g. by Will (*Boraston's* Case, 1587, 3 Rep. 19). It would seem very material to inquire whether the effect of this rule has not been greatly modified by 8 & 9 Vict. (1845) c. 106—not by section 6, as was suggested in *Boddington* v. *Robinson* (1875) L. R. 10 Exch. 270, but by section 2.

'supports' the remainder will support the estates created out of it. But these estates must likewise observe the rule as to 'support' by particular estates[1]; although the reasoning does not apply, for, in the event of a hiatus occurring in their succession, the right to the seisin would be in the person who created them.

Of course, however, the rule does not apply to remainders for terms of years, upon which no seisin can depend; and terms of years are frequently limited to commence *in futuro*.

2. No remainder after a fee simple.

(ii) *No remainder can be limited to take effect after a fee simple absolute.* Generally speaking, the number of remainders which may be created by one conveyance is unlimited. There may be a limitation to *A* for life, remainder to *B* for life, remainder to *C* for life, remainder to *D* in tail male, remainder to *E* in tail general, and so on, *ad infinitum*. It follows, however, from the operation of the statute *Quia Emptores*[2], that there never can be more than one remainder in fee simple absolute, nor any remainder after it. For every limitation of a fee simple by a subject must, since 1290, be by way of transfer, not creation; and, when once the conveying party has transferred his fee simple absolute, he has nothing more to convey. But several alternative fees may be limited as remainders upon one particular estate, upon such contingencies that not more than one of them can possibly happen. For, although, after conveying away even a conditional fee, the settlor will have no reversion, properly so called, yet he will have a possibility of reverter, which he may dispose of. Thus, where land was limited in trust for *E* for life, remainder to *W* for life, remainder to *R* in fee, if *R* should survive *E*, and, if not, to *E* in fee; it was held that the final limitation to *E* was perfectly valid, and that (*R* having died in the lifetime of *E*) it operated to give *E* an estate in fee[3].

These first two rules apply to all legal remainders; but we

[1] *Swift* v. *Eyres* (1640) Cro. Car. 546.

[2] 18 Edw. I. (1290) c. 1.

[3] *White and Hindle's Contract* (1877) 7 Ch. D. 201.

have now to notice two other rules which can apply only to that particular class of remainder which we call 'contingent,' the nature of which it is necessary to explain.

Vested remainders.

When the nature of a remainder is such that it awaits *only* the determination of the particular estate or estates, to confer an interest in possession, the remainder is said to be 'vested.' The term is, perhaps, unfortunate; for 'vesting' is, historically at least, linked with seisin, and no one can be seised of a remainder. But it is by long usage understood to signify that the interest which it describes is definitely annexed to a particular person or persons. Thus, a limitation 'to *A* for life, remainder to *B* and his heirs,' is said to confer a vested remainder on *B*, because the latter's interest will come into possession the moment *A*'s estate determines. And it makes no difference that *A* may survive *B*; for *B*'s interest will pass to his heir, devisee, or alienee, without losing any of its characteristics. It is a *present* interest, though not carrying present possession.

Contingent remainders.

But if the remainder be limited so that it awaits, not only the determination of the prior estates, but also the happening of some external event, it is said to be 'contingent.' Thus, in a limitation 'to *A* for life, and after his decease to the eldest son of *B*, living at *A*'s decease, and his heirs,' the remainder is 'contingent.' It may never come into possession at all; for *B* may never have any sons, or, if he have sons, they may all die in *A*'s lifetime, or none may be born till after *A*'s death. In all these cases the remainder will fail *as a remainder*; and, even if it does not fail, it will be impossible to say, until *A*'s death, who will be qualified to claim it. Therefore it will, at least during *A*'s lifetime, be rather of the nature of a *spes successionis*, or chance, than an actual interest. And as such it was so obviously regarded for a long time, that it was deemed to be inalienable, even by the person who felt morally certain of ultimately securing it[1]. This disability has, however,

[1] *Lord Mordant & Vaux's* Case (1591) 1 Leon. 244. It could, however, be got rid of by levying a fine under the 4 Hen. VII. (1488) c. 24.

been removed, for Wills by the Wills Act, 1837[1], and for alienations *inter vivos* by the Act to Amend the Law of Real Property[2].

We now come to two additional rules for the creation of remainders, which affect contingent remainders only.

3. No limitation to issue of unborn taker.

(iii) *A limitation to the issue of an unborn person, following a limitation in the same instrument to that person himself, is, if the instrument be a deed, void; if it be in a Will, it operates to confer an estate tail on the first taker, provided that the issue in question would, in the natural course, succeed to the estate tail if it were not barred*[3]. Thus, a limitation to *A* for life, with remainder to his eldest son (unborn) for life, with remainder to the latter's eldest son in fee, would, if occurring in a deed, be void as to the remainder in fee; if it occurred in a Will, it would confer an estate tail in remainder on *A*'s eldest son, contingent upon the death of *A* leaving a son.

This rule, which seems so arbitrary at first sight, can be best understood by a reference to its origin. It has always been a matter of regret with many people that the legal fiction whereby an estate tail used to be destroyed was ever sanctioned by the Courts. Accordingly, the ambition of conveyancers was long directed to devise a series of limitations whereby an unbarrable estate tail should be, in fact, created; and such is, obviously, the aim of the limitation condemned by the above rule. But, after the decision in *Mary Portington's* Case[4], the Courts could not allow their resolution to be evaded, and the rule soon made its appearance. But it does not seem to have been formally laid down before the famous Marlborough case, which was decided with all solemnity by the House of Lords, after consulting the Judges, in February,

[1] 7 Will. IV. & 1 Vict. c. 26. § 3. [2] 8 & 9 Vict. (1845) c. 106. § 6.

[3] *Spencer* v. *Duke of Marlborough* (1763) 3 Bro. P. C. 232; *Humberston* v. *Humberston* (1716) 2 Vern. 737. The second part of the rule is known as the '*cy-près* doctrine,' and is an example of the lenient construction placed upon the language of Wills.

[4] (1613) 10 Rep. 35.

1763[1]. In that case, the first Duke had endeavoured to tie up his private property in the same manner as that adopted by the Act of Parliament which conferred upon him the Honour of Woodstock. He accordingly devised his estates to trustees, upon trust for his daughters and living grandsons successively for life, with remainders to their sons in tail; which was a perfectly lawful limitation. But he then directed that, on the birth of each successive tenant in tail, the trustees of the Will should revoke the limitation to such person in tail, and substitute for it a limitation for life, with remainder to *his* issue in tail. The Duke's advisers seem to have been fully aware of the doubtfulness of the proceeding; for the Will directed the trustees to apply for an Act of Parliament to confirm its provisions. No such Act was, however, obtained; and the first tenant in tail under the Will, a great-grandson of the first Duke, successfully claimed a conveyance to himself of the legal estate tail, which he promptly proceeded to bar[2].

To the main doctrine thus solemnly established, Lord Kenyon, in the case of *Brudenell* v. *Elwes*, decided in 1801[3], proceeded to add the corollary, that all remainders subsequent to the void limitation are themselves likewise void; even though they should, themselves, not otherwise offend against the rule. A recent attempt to argue that the rule has been superseded by the more modern doctrine of 'remoteness,' was decisively repudiated by the Court of Appeal[4].

4. No limitation to heirs of unborn person.

(iv) *A limitation by way of remainder to a corporation not in existence, or to the heirs of an unborn person, is void.*

And it makes no difference that the corporation is created or the person born before the determination of the particular estate.

This rule, the result of medieval reasoning about 'double possibilities,' is as old as the fifteenth century, having been

[1] *Journals of the House of Lords*, vol. x. p. 327.
[2] *Spencer* v. *D. of Marlborough* (1763) 3 Bro. P. C. 232.
[3] 1 East, 442.
[4] *Whitby* v. *Mitchell* (1889) 44 Ch. D. 85.

clearly laid down in a case of the year 1487[1]. It proceeds upon the argument, that a limitation to an unborn person, simply, involves only a single possibility, viz. the birth of that person during the continuance of the particular estate; while a limitation to the heirs of an unborn person involves also the double possibility of such a person being born, and dying in the same time, leaving heirs. The reasoning does not seem to cover the case of the corporation; but the actual decision was to that effect. Of course the rule can only apply to remainders; for no present estate can possibly be vested in an unborn person. And it can only apply to *contingent* remainders; for every remainder limited to an unborn person must necessarily be contingent. The cases do not seem to go beyond the word 'heirs'; and perhaps a limitation to *A*, a bachelor, for life, with remainder to his eldest grandson in fee, would create a good contingent remainder, although the grandson in question would necessarily be the child of an unborn child.

Incidents of reversions and remainders.

With regard to the ordinary incidents of tenure, it is evident that many of them do not apply to reversions or remainders, being obviously designed to meet the case only of the tenant seised. Thus fealty, wardship, dower and freebench, curtesy, and suit of court, do not attach to reversions or remainders. It is obvious that rent cannot be *reserved* out of a reversion; for that would be to reserve it to the reversioner himself. But a lease may be granted to take effect after the expiry of an estate for life[2]. And a rent charge may, of course, be granted out of a reversion, though the reversion may be a poor security. It was said in an old case that, if rent were reserved out of a remainder, it would not become payable until the particular estate had determined[3].

On the other hand, it seems clear that the incidents of

[1] Y.B. 2 Hen. VII. 13 Hil. pl. 16; followed in *Cholmley's* Case (1597) 2 Rep. 50.

[2] *Throckmerton* v. *Tracy* (1556) Plowd. 145.

[3] *Mordant & Vaux's* Case (1591) 1 Leon. 243, *arguendo*. Co. Litt. 47 a.

escheat[1] and forfeiture[2] do, and the incidents of heriots[3], and fines on alienation and descent may[4], if the custom be clear, attach to reversions and remainders. The reversioner or remainderman of a copyhold or customary tenement may, apparently, compel enfranchisement[5]. And the remainderman in tail may, by a disentailing assurance, bar his own issue, but not subsequent remainders or the reversioner, unless he obtain the consent of the 'protector of the settlement[6].'

Besides the four rules above quoted, which have regard to the creation of remainders, there are two rules affecting their operation, which give rise to important consequences.

1. A remainder awaits the natural determination of the particular estate.

(i) *A remainder must await the regular determination of the preceding estate.* This rule is an application of the common law principle, that no one can take advantage of a breach of condition but the person making the condition, or his representatives[7]. Therefore, if a remainder were limited to take effect after a particular estate which was defeasible upon condition broken, the creator of the estate, and not the remainderman, would alone be entitled to enter for the breach. And it was at one time strict law that, if he did enter, the remainder would be destroyed, because the livery which created it had been destroyed by entry for condition broken[8].

[1] Brooke's Abridgement. (*Prerogative*, pl. 25.) Brooke cites a case of 15 Hen. IV. 11, as his authority, and is followed by Viner (*Escheat* (A) 12). But as Hen. IV. only reigned fourteen years, the case is not easily traceable.

[2] Anonymous of 1578, 1 Leon. 262.

[3] *Butler* v. *Archer* (1594) Owen, 152.

[4] *Reg.* v. *Dullingham* (1838) 8 A. & E. 858.

[5] Copyhold Act, 1894 (57 & 58 Vict. c. 46.), § 50.

[6] 3 & 4 Will. IV. (1833) c. 74. §§ 15, 34. As to the meaning of 'protector of the settlement,' see post.

[7] At the common law, no one but the maker and his heirs could take advantage of a condition in deed (Co. Litt. 214 a). By various statutes, however, the power has been extended to grantees and assignees of reversions (32 Hen. VIII. (1540) c. 34; 22 & 23 Vict. (1859) c. 35. § 3; 44 & 45 Vict. (1881) c. 41. §§ 10, 12); and even to persons not having any interest in the land (7 Will. IV. & 1 Vict. (1837) c. 26. § 3; 8 & 9 Vict. (1845) c. 106. § 6).

[8] As to this see post, cap. x.

But the rule which forbids a remainderman to take advantage of a breach of condition affecting the particular estate applies only to conditions *in deed*, i. e. conditions specially agreed upon by the parties themselves, not to conditions *in law*, i. e. conditions annexed to the particular estate by implication of law. Thus, if the tenant for life committed Waste or enfeoffed a stranger in fee, it seems clear that the remainderman could claim the forfeiture[1].

And a careful distinction must be drawn between a condition, the breach of which occasions a forfeiture *if enforced*, and a limitation by force of which the particular estate comes to an end, *ipso facto*, on the happening of an event. In the latter case, if it be clearly intended that the happening of the event shall pass the land to the remainderman, the latter will be entitled, not by forfeiture, but by limitation. Thus in *The Lady Anne Fry's* Case[2], decided in 1672, the Earl of Newport devised a house to his widow for life, remainder to his grand-daughter (then Lady Anne Knolles) in tail, 'provided always, and upon condition, that she marries with the consent of my wife . . . and in case she marries without such consent, or happen to die without issue, then I give and bequeath it to George Porter.' After the testator's death, his grand-daughter married without consent; and, on the death of the tenant for life, the claim of George Porter was adjudged to be good, to the exclusion of the grand-daughter, on the ground that the so-called condition was clearly intended to be a limitation over in favour of the ultimate remainderman[3].

2. Must be ready to take effect immediately.

(ii) *A remainder must be ready to take effect in possession at the instant at which the particular estate determines.* This rule cannot affect vested remainders, which, by their very

[1] F. N. B. 129 C. (Waste); *Anonymous* of 1578, 1 Leon. 262.

[2] 1 Ventris, 199.

[3] See also *Boraston's* Case (1587) 3 Rep. at 21 a. The numerous cases quoted by Coke in support of the rule seem to be all cases of Wills. But Plowden's note to the much older case of *Warren* v. *Lee* (1556) Plowden, 127 b, shows that he considered the rule to apply also to conveyances *inter vivos*.

definition, await only the determination of the particular estate to take effect in possession. But it was and, in spite of recent legislation, still is, of the greatest importance to contingent remainders. For if the determination of the particular estate should take place before the happening of that external event upon which the contingent remainder is to vest, the remainder will 'fail,' or become extinct, unless specially protected by recent legislation. Thus, a limitation to *A* for life, remainder to the eldest son of *B* living at *B*'s decease for life, remainder to *C* and his heirs. Here, if *A* die in the lifetime of *B*, the remainder to *B*'s eldest son cannot come into possession at once, for it is not certain who will be *B*'s eldest son living at the time of his decease. And, but for the protection of a statute which will hereafter be referred to [1], the remainder would have been absolutely gone.

But a still harder case occurred, when the particular estate came to an end, not by natural effluxion, but by premature determination. Thus, in the example last given, if *A*'s life estate had been forfeited for felony, or, if *A*, by collusion with the ultimate remainderman, *C*, had surrendered his estate to him (*C*), by virtue whereof *A*'s life estate would have become extinct by 'merger [2],' the claims of *B*'s eldest son would likewise have been defeated. To provide against this possibility, it was usual to limit, after the genuine particular estate, a remainder to trustees from the event which caused the premature determination, until the time of the natural expiration of the particular estate. Thus, to revert once more to our example, the limitation would have run—'to *A* for life, and from and after the determination of that estate during the lifetime of *A*, then to *X* and *Y* and their heirs during the life of *A*,' remainder to the eldest son of *B* &c. Here *X* and *Y* were said to be 'trustees to preserve contingent remainders,' and, even without express words to that effect, were held bound by the Court to effect that object. A doubt for some time existed as to whether the estate of the trustees were

[1] Post, p. 105.

[2] As to 'merger,' see post, cap. xx.

itself not a contingent remainder, inasmuch as it was entirely dependent for its vesting upon the happening of an uncertain event. But, it having been solemnly decided otherwise in the case of *Dormer* v. *Packhurst*[1], it became an unquestioned rule of law that the interposition of trustees to preserve contingent remainders would effectually prevent the failure of those remainders by any premature determination of the particular estate. The necessity for such interposition has now disappeared; for it was provided by the Act to Amend the Law of Real Property[2], that a contingent remainder existing at any time after December 31, 1844, should be capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger[3] of any preceding estate of freehold[4], just as if that determination had not happened. Act of 1845.

But the Act of 1845 did not provide for the most obvious case, viz. that of the failure of a contingent remainder owing to the natural expiration of the particular estate. An attempt had been made in the previous year to abolish contingent remainders altogether[5]; but the attempt proved abortive[6], and the modest provision of the Act of 1845 remained for thirty years the sole alleviation of the precarious lot of the contingent remainderman. But, in the year 1877, the Contingent Remainders Act[7] provided that, *as respects all contingent remainders created since August* 2, 1877, which would have been valid if limited as executory interests, they should take effect as if they had been so limited, notwithstanding the determination of the particular estate before the period of vesting. This statute, which, be it observed, only applies to contingent remainders created after its passing, leads us naturally to the consideration of executory interests. Act of 1877.

[1] (1742) 3 Atk. 135. [2] 8 & 9 Vict. (1845) c. 106. § 8.

[3] The Act does not say what would happen to the contingent remainders in the event of the grantee of the particular estate *disclaiming*. The question is of no importance now; but it was important until 1877.

[4] A remainder upon a term of years could itself only be a term of years, and this would take effect notwithstanding determination of particular estate. [5] 7 & 8 Vict. (1844) c. 76. § 8.

[6] Being repealed by 8 & 9 Vict. (1845) c. 106. § 1. [7] 40 & 41 Vict. c. 33.

Executory interests.

(*b*) *Executory interests.* Hitherto we have assumed that the object of every limitation has been, to vest the legal seisin, or at least the possession of the land, in the alienee, immediately or ultimately. Such limitations were, in fact, the only limitations regarded by Courts of Law as valid, until the passing of the famous statute of which we are now about to treat. A limitation which did not contemplate the transfer of seisin was not regarded by Courts of Law as being a limitation at all.

But, as feudalism grew to be less and less a living force in society, its principles were felt to be more and more irksome. Why should there not be interests in land which did not involve seisin, or even possession? If it were desired to give *A* the beneficial advantage of a piece of land without constituting him *terre-tenant*, or actual occupier, why should it not be done? Feudal principles, it is true, required that there should be a tenant legally seised. But why should not this legal tenant be required to hand over the profits to *A*? *A* might be a person who could not, conveniently or absolutely, accept seisin. He might be an infant, or the abbot of a convent forbidden by the Statutes of Mortmain[1] to hold lands without royal licence. And yet he and his donor might desire that he should have the advantage of the lands.

Uses.

Where such a desire exists, it is pretty sure to find some means of realizing itself. And these means proved in England to be the invention of the *use*. If *A* desired to make *B* the beneficial (but not the legal) owner of a piece of land, he either conveyed it to *X* to hold 'to the use of,' or, 'in trust for,' or 'in confidence that *X* would pay the profits to' *B*, for years, life, or in fee; or he covenanted that he would himself stand seised of it to a similar intent. In the first case, the use was said to operate 'with transmutation of possession,' because livery of seisin was necessary to transfer the legal estate to *X*, the 'feoffee to uses.' In the second case, it was said to operate 'without transmutation of possession,' because

[1] As to Mortmain, see post, cap. xiii.

no livery of seisin was required, the legal estate, as before, remaining in *A*. No special words were necessary to create the use. The words most frequently employed were 'to the use of,' or, in Latin, *ad opus* (*oeps*), *ad usum*; but any expression sufficiently evincing the donor's intention was good[1]. Furthermore, it was not at all necessary that a man in making a feoffment to uses should specify at once the objects of his bounty. He might leave that to be declared afterwards by a deed or word of mouth, or, more important still, by testament; and in this way lands became practically devisable, long before they could be legally devised. This last fact, the very forefront of the preamble to the Statute of Uses, ought to be carefully borne in mind, in order that the nature of the 'executory devise' may be thoroughly understood.

Now, as we have said, the Courts of Law long declined to recognize any limitation which did not contemplate an immediate or ultimate livery of seisin. To them the feoffee to uses was the legal owner; beyond him they would not look. The interest of the person for whose benefit the use was created—the *cestui que use*, as he came to be called—was nothing to them. But, towards the end of the fourteenth century, there grew into prominence another tribunal, not a Court of Law at all, but a Court of Equity, claiming to exercise jurisdiction *ex bono et aequo*, unfettered by the technical rules of law[2]. This tribunal, the Court of Chancery, found in the subject of Uses a fruitful field for its expanding claims. Apparently, it had at first two serious rivals, in the popular courts and the ecclesiastical courts. But the former early dwindled before the powerful competition of the common law courts, while the latter were, for political reasons, jealously watched by the State, and had little oppor-

Protected by Chancery.

[1] *Broughton* v. *Langley* (1703) Sir John Holt, 708.

[2] The student will, of course, read for himself the account of the origin of the Court of Chancery in some standard text-book, e. g. Stubbs, *Constitutional History of England*, vol. ii. § 234; Digby, *History of the Law of Real Property*, 3rd ed., pp. 279–88. One of the most readable versions is to be found in Haynes' *Outlines of Equity*, lect. ii.

tunity for extending their jurisdiction. Before the end of the fourteenth century, we find recorded instances of applications to the Chancellor for the protection of *cestui que use*[1]; and from that time onward the cases multiply, although, even so late as the reign of Edward IV, the common law courts intimate doubts of the validity of the procedure[2]. And the Court of Chancery had to move with caution. It did not attempt to deny that the legal estate was in the feoffee to uses. It merely summoned him by a *subpoena* to appear and explain why he had not performed the trust which he had solemnly undertaken[3]. And if he would not act according to equity and good conscience, he was put in prison.

Character of the Use.

The striking feature of these non-feudal interests, or uses, which in fact constituted their great charm, was that they were at first entirely free from all the burdensome incidents of common law estates, such as forfeiture, escheat, wardship, reliefs, and the rest, as well as from the technical rules of construction and conveyance adopted by the common law courts. Thus, although interests analogous to legal estates could be created by way of use, these interests would be valid in Chancery, though they should contravene the rules about abeyance of the freehold, limitation after a fee simple, and the like. Moreover, they could be transferred by secret and informal conveyances, without livery of seisin.

On the other hand, it must be remembered, that this immunity was only secured at the expense of serious risks. A *cestui que use* would not lose his land for his own felony; but he might lose it for the felony of his feoffee to uses. The latter's estate, being strictly legal, was liable to all the legal incidents; and the fact that the occurrence of such

[1] See *Select Cases in Chancery* (Selden Society, vol. x), Cases 40, 45, 71, 72. The last case alone contains the actual word 'use'; the others are, however, clearly of the same character.

[2] Y. B. 8 Edw. IV. (1468) T. pl. 1. p. 6.

[3] It seems highly probable that, in many cases, the feoffees to uses had taken solemn oaths to carry out the feoffor's wishes. See *Select Cases in Chancery*, p. 49.

incidents damaged the *cestui que use* would not prevent their occurrence. It was only by slow degrees that the interest of the *cestui que use* was protected against any one but the actual feoffee to uses.

From the very first, therefore, in the history of uses, we notice a twofold tendency. On the one hand, the interest of the *cestui que use* is gradually made liable to the common law incidents of estates. On the other, it is gradually protected against the defaults and misfortunes of the feoffee to uses. But to trace these tendencies would lead us into the subject of equitable interests, reserved for the next chapter. For, long before these tendencies had realized themselves, legislative interference had threatened to destroy their existence altogether. By one of the most curious fates that have ever attended Acts of Parliament, the statute in question, so far from destroying uses, doubled their importance, by giving them a legal as well as an equitable existence. It is upon their legal existence that the subject of executory interests depends.

Two tendencies of the Use.

The Statute of Uses[1], passed in the year 1535, aimed at converting uses into legal estates, and attaching to them all the incidents of legal estates. To this end, it provided[2] that, where *A* was seised 'to the use, trust, or confidence of *B*,' *B* should from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession (of the hereditaments in question) 'of and in such like estates as he had or shall have in use, trust, or confidence of or in the same.' The language is not happy; but the meaning is clear. The 'use, trust, or confidence' which, before the passing of the statute, created a mere personal claim against the feoffee to uses, enforceable only by a Court of Equity, was now to create a legal estate, recognizable by Courts of Law.

Statute of Uses.

The real mystery of the section lay in the words '*deemed and adjudged*.' Had the Act simply required that feoffees to uses should immediately deliver seisin to the persons

[1] 27 Hen. VIII. (1535) c. 10. [2] § 1.

entitled to the use, the use would have remained a mere *jus in personam* at law, until the seisin had been delivered. But the framers of the Act knew very well that such a direction would never, or rarely, be carried out; and so they resolved to dispense with the operation. The result of their resolution was to change entirely the meaning of the word 'seisin.' Hitherto 'seisin' had been exclusively a state of fact; the condition of the person actually possessed, by himself or his tenant for years, as feudal owner. Even the old 'livery in law' had not conferred seisin without subsequent entry, or, at least, 'continual claim[1].' But now 'seisin' was to signify, not merely the state of the actual possessor, but the state of the person entitled to possession, and to be treated as in possession, by the Statute of Uses.

Effect of the statute.

Briefly put, the result was, to enable legal interests to be created in the same way and by the same simple means as had before been employed to create and regulate the disposition of uses. If, before the statute, *A* had 'bargained and sold,' i. e. agreed to sell, land to *B* in fee simple, and *B* had paid or agreed to pay value for his purchase, the Court of Chancery had held that *A* was seised 'to the use of' *B* in fee simple. By the force of the statute, *B* would have, since its passing, a legal estate in fee simple where he before had merely a use. This result was so startling and so undesirable, that a second statute was hastily passed in the same session, for the purpose of avoiding it[2]. But, in other respects, the logical result of the Statute of Uses was allowed full play. Thus, the Court of Chancery had been in the habit of recognizing all sorts of limitations of uses which set at defiance the technical rules of common law conveyancing. If *A* had enfeoffed *B* and his heirs to the use of *C* and his heirs after the expiry of six months, no harm was done; the seisin would not be in abeyance during the six months, for it would be vested in *B* and his heirs, and the Court would hold that, during that period,

Bargain and sale.

Future interests.

[1] Co. Litt. 48 b.

[2] 27 Hen. VIII. (1536) c. 16. As to this, see post, cap. xviii.

there was an implied use in favour of *A*, unless *B* had given value, or unless *A* stood *in loco parentis* to *B*. At the end of the six months, *C*'s use would 'spring up' and take effect. Springing use. Or again, if *A* had enfeoffed *B* and his heirs to the use of *C* and his heirs, but if *C* should die childless, then to the use of *D* and his heirs; on the death of *C* without children, the Court of Chancery would have held that *C*'s use 'shifted' to *D* and his heirs. Shifting use. Or, finally, if *A* enfeoffed *B* and his heirs to such uses as he (*A*) should by subsequent deed or word of mouth appoint; upon the exercise of this power of appointment the Court of Chancery would have held that the use vested in the nominee under the appointment. Powers. But all these limitations would have been bad at common law; the first as an attempt to create a freehold *in futuro*[1], the second as an attempt to limit a remainder after a fee simple[2], and the third as an attempt to limit an estate to an uncertain person.

Of course it was just possible that the Courts of Law might have put a narrow construction on the Statute of Uses, and have declared that limitations to uses which contravened the principles of the common law had not been legalized by the statute. But, as this course would have played directly into the hands of the Court of Chancery, they wisely took the more liberal view, and recognized the validity of all limitations which the Court of Chancery had permitted in dealing with uses, giving them effect according to the rules of common law where such a construction did not defeat the existence of the interest[3].

For some short time after the passing of the Statute of Uses, it appeared as if the subject of executory interests would no longer be connected with the subject of devises; for the wording of the statute did not permit of a doubt that devises of lands were intended to be prohibited. Here again,

[1] Ante, pp. 95–6. [2] Ante, p. 97.

[3] This generalization, which fairly represents the policy of the common law courts in the half century which followed the passing of the Statute of Uses, may be traced by the student in the reports of Plowden, Coke, and Croke (Eliz.).

however, the statute singularly failed of its object; for in the year 1540 it was found necessary to pass a statute, the first Statute of Wills[1], authorizing the devise of all socage and two-thirds of knight-service lands. By virtue of this statute, the subject of devises again became very important; and, although devises were by the statute made legal as direct limitations of the legal estate, without the intervention of uses, yet the recent intimate connection between Wills and uses seems to have induced the courts to construe devises as liberally as though they had been limitations to uses. Thus executory devises have always ranked on the footing of executory limitations to uses, and shared the same privileges. More than this, in addition to the lenient construction always placed upon testamentary language, an executory devise has at least one substantial advantage over an executory limitation by deed, in that it can dispose of a future interest in a term of years, or even in pure chattels[2]. But, as no one can at the present day be seised of a term of years or a chattel, no uses of either can be limited by deed[3].

Executory devises.

The executory interests which may be limited by deed or Will, fall, as we have said, into two great classes, known respectively as 'springing' and 'shifting' uses. A 'springing' use occurs when a limitation is made to spring up independently of any former limitation at some future time. Thus, a limitation 'to *A* and his heirs to the use of *B* when he shall attain twenty-one years,' or, in the case of a devise, 'to *B* when he shall attain twenty-one years,' is a simple case of a springing use. Such a limitation would be bad at the common law; but, by virtue of the statute, an estate will arise in *B* at the happening of his majority. Only, in the case of the deed,

Springing uses.

[1] 32 Hen. VIII. c. 1. See post, chapter on Devise (xxiii).

[2] *Eyres* v. *Faulkland* (1697) 1 Salk. 231; *Hyde* v. *Parratt* (1695) 1 P. Wms. 1.

[3] Of course, *A* can be seised of a freehold to the use of *B* for a term of years, as the statute expressly says. But that is another matter. And *B* can have an 'equitable interest' in a term of years legally vested in *A*. (See post, p. 127.)

the estate would be but for life, because, in spite of some hesitation[1], the Courts ultimately decided to put the same construction upon limitations to uses as upon limitations at the common law, where such construction did not defeat the existence of the use[2]. But the gift by devise would give *B* an executory interest in fee. In the meantime, and subject to the happening of the event, the law implies a resulting use in favour of the conveying party in the first case, and the testator's heir in the second[3].

Shifting uses.

'A 'shifting' use, on the other hand, is an executory interest which, upon its arising, devests a former estate and terminates it. Thus, a limitation 'to *A* and his heirs, to the use of *B* and his heirs, but if *B* shall not within five years assume the name and arms of *X*, then to the use of *C* and his heirs,' gives *C* an executory interest by way of shifting use, which will devest *B*'s estate on the expiry of the five years, unless *B* has, in the meantime, assumed the name and arms of *X*. And a similar interest would be created by a devise 'to *B* and his heirs, but if *B* should not (&c.) then to *C* and his heirs.' It will at once be seen that such a limitation does what a limitation by way of legal remainder cannot do, viz.: enable *C* to take advantage of a forfeiture.

Differences between executory interests and remainders.

Perhaps the most useful way of explaining the peculiarities of executory interests will be to enumerate briefly the points in which they differ from remainders at the common law.

Limitations to settlor.

(i) *By means of them a man could convey directly to himself, when he could not do so at the common law.* This is a point now of small importance, but formerly of considerable value. So long ago as the year 1291, it was solemnly decided in Parliament, with the advice of the judges, that a common law limitation

[1] e. g. *Shelley's* Case (1581) 1 Rep. 101 b; *Abraham* v. *Twigg* (1596) Cro. Eliz. 478; *Wilkes* v. *Lenson* (1559) Dyer, 169 b.

[2] Saunders on *Uses*, p. 168.

[3] *Audley's* Case (1559) Dyer, 165 b. And it is this resulting use which really supports the executory interest. For, if it be excluded by clear inference from the language of the deed, the executory limitation must then be construed as a remainder, and conform to the common law rules. *Adams* v. *Savage* (1703) 2 Salk. 679.

by the owner of an estate to himself, even of an undivided share, would be void[1]. The case is an extremely strong, as well as a very interesting one. Thomas of Weyland, tenant in fee of the manor of Sobbirs (? Sodbury) in Gloucestershire, which he held of the earl of Gloucester, levied a Fine, by which he acknowledged the manor to be the property of Geoffrey Aspale, who then granted it to Thomas of Weyland, Margaret his wife, and Richard their son, to hold to Thomas and Margaret for the lives of each of them, with remainder to Richard in tail, with further remainder to the heirs of the body of Thomas by Margaret his wife (a limitation which, in later days, would have given Thomas a remainder in special tail)[2]. Thomas then committed felony, and abjured the realm; whereupon the king claimed Year and Waste, and the earl of Gloucester forfeiture of Thomas' interest during his life. But it was decided that the earl's claim was unfounded, nothing having passed to Thomas by the grant. It will be observed that, in this case, Thomas did not convey directly to himself, although the Fine and grant were, doubtless, one transaction. *A fortiori*, a feoffment to the feoffor himself would have been void. But, inasmuch as it was quite a regular thing, after the invention of uses, for a man to enfeoff others to the use of himself, either solely or in conjunction with others, such limitations were recognized as conveying the legal estate after the passing of the Statute of Uses. Only, the interest of the feoffor was deemed to be that of which he was formerly seised, before the feoffment. To use technical language, he was 'in of the old use, not of the new,' until the Inheritance Act, 1833, declared that a limitation to the assurer or his heirs should cause them to take by purchase[3]. And now, a direct conveyance may be made by any one to himself jointly with another[4].

[1] Rot. Par. I. 66. *Thomas of Weyland's* Case.

[2] This Fine and grant were of the year 1278; it will be seen, therefore, that the last limitation was a remainder upon a conditional fee.

[3] 3 & 4 Will. IV. c. 106. § 3. This section only applies to instruments taking effect after Dec. 31, 1833.

[4] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 50. The proper way

(ii) *They do not necessarily await the determination of the preceding estate.* Thus, in the case put, of a limitation 'to *A* and his heirs, to the use of *B* and his heirs, but, if *B* shall not within five years assume the name and arms of *X*, then to the use of *C* and his heirs,' it is clear that *B* is intended to have a fee simple, subject to the penalty of losing it if he does not fulfil a certain condition. It is not a limitation to *B* and his heirs *until* a certain event happens. Yet *C*'s estate would arise of its own force immediately the fulfilment of the condition became impossible [1]. But here we touch upon a famous controversy, lately laid to rest. Out of what would *C*'s estate arise? The Statute of Uses contemplated that every use should be dependent on a legal seisin. But, in this case, the seisin of *A* had been utilized to give birth to the estate of *B*; and, as this estate was the largest known to the law, viz. a fee simple, it was argued that it was exhausted by the act. More than one ingenious suggestion were made, with a view of overcoming the difficulty; but that which found most favour was the doctrine which asserted that a *scintilla juris*, or particle of seisin, remained in *A* or his heir, which would enable the use of *C* and all subsequent shifting uses to arise out of it. This ingenious doctrine was abolished by statute in the year 1860 [2]; and now, by force of the statute, all uses, express or implied, and whether immediate or future, executory or contingent, arise and take effect by virtue of the estate and seisin originally vested in the person seised to the uses. But it is important to observe, that the seisin originally conveyed must be extensive enough to cover the execution of the use. Thus, if land be conveyed to *A* for life, to the use of *B* and his heirs, *B*'s estate will only be an estate *pur auter vie*, limited to his heir as special occupant [3]; and on

Premature determination of preceding estate.

Scintilla juris.

in which to make another person *tenant in common* with the assurer, is to convey to him an undivided share of the estate.

[1] *Moore* v. *Moore*, 1892, 2 Ch. 87.

[2] 23 & 24 Vict. c. 38. § 7.

[3] This seems to have been for some time doubtful. See *Crawley's* Case (1599) Cro. Eliz. 721. But Plowden's opinion (*Anon.* of 1560, Plowd. 186 a) ultimately prevailed. See Saunders on *Uses*, p. 477 seq. But this is only where the seisin is limited to a stranger. Where the *cestui que use*

A's death it will determine. It is one of the vexed questions of the law whether a tenant in tail can be seised to uses which the statute will execute [1].

Interval after determination.

(iii) *They need not be ready to come into existence at the determination of the preceding estate.* Thus, to alter slightly the case put, suppose a limitation 'to *A* and his heirs, to the use of *B* and his heirs, but if *B* should not assume the name and arms of *X* within five years, then to the eldest son of *C* and his heirs.' Here, at the expiry of the five years, *C* might have no son; but a son might be born to him several years later. As a contingent remainder, the limitation to *C*'s eldest son would undoubtedly have failed before the Act of 1877; but as a shifting use it would arise on the birth of *C*'s son, the use in the interval resulting to the settlor or his representatives. This immunity from destruction constituted, in fact, one of the great advantages which executory interests had over legal remainders; and, until lately, it could only be impeached in one case, viz. of the limiting of an executory interest after an estate tail. Here, by virtue of the Fines and Recoveries Act, 1833 [2], which in this respect followed the previous law [3], a desentailing assurance, properly executed to bar remainders, will extinguish any executory interest limited to take effect after or in defeasance of it. And now, by the Conveyancing Act, 1882 [4], it is provided that where a man is entitled to land in fee, or for a term of years, or for life, with an executory limitation over on default or failure of all or any of his own issue, such executory limitation shall become void so soon as any of the issue described attain the age of twenty-one years. But this section only applies to a limitation contained in an instrument executed after December 31, 1882.

Perpetuities.

This immunity from destruction for want of observance of

is himself also feoffee, the use is mere surplusage, and he takes the larger estate. *Jenkins* v. *Younge* (1655) Sir W. Jones' Rep. 253. The report in Cro. Car. 230 is incomplete.

[1] Saunders, *Uses*, pp. 143–52.

[2] 3 & 4 Will. IV. c. 74. § 15.

[3] See *Page* v. *Hayward* (1704) 2 Salk. 570 (4th ed.).

[4] 45 & 46 Vict. c. 39. § 10.

the common law rules led, doubtless, to the establishment of the famous Rule against Perpetuities, which was gradually growing during the seventeenth and eighteenth centuries, but which was finally settled by the leading case of *Cadell* v. *Palmer* in the year 1833[1]. There it was laid down, that every executory limitation which may possibly take effect in possession after the expiry of a life or lives in being at the time of its creation and twenty-one years afterwards is *ipso facto* void. The only exception to the rule is an allowance of the period of gestation, where gestation actually exists. Thus, in the case of a devise to the first son of *A* who should attain twenty-one years, if *A* were to die, leaving his wife *enceinte*, and a posthumous son were born, the latter would, if he lived to be twenty-one, be able to claim under the limitation. But the rule does not apply to executory interests limited after an estate tail[2]; because, as we have seen, an estate tail is always liable to be barred in such a way as to destroy the subsequent executory limitations.

Accumulations.

As a corollary to the Rule against Perpetuities may be mentioned the Rule against Accumulations laid down by statute in the year 1800, commonly known as the Thellusson Act[3]. By this rule, every direction to accumulate the income of any property beyond one of four alternative periods provided by the Act is rendered void, and the income thus directed to be accumulated is to go to the person who would have been entitled to it but for the direction. The alternative periods are—(*a*) the life or lives of the person or persons making the disposition in which the direction is contained, (*b*) an absolute period of twenty-one years from the death of such person or persons, (*c*) the minority or minorities of any person or persons living or *en ventre sa mere* at the death of such persons, (*d*) the minority or minorities of any person or persons who would, if of full age, be entitled under the disposition to the

[1] 1 Cl. & F. 372. But the rule was really recognized before. See *Jee* v. *Audley* (1787) 1 Cox, 324.

[2] *Nicolls* v. *Sheffield* (1787) 2 Bro. Ch. Ca. 215.

[3] 40 Geo. III. c. 98.

income directed to be accumulated. But the restrictions of the Act do not apply to directions to accumulate for the purpose of paying debts, or for the purpose of raising portions for any child of the person or persons directing the accumulation or of any one taking an interest under the assurance in which it is contained, nor to any directions concerning timber [1].

Griffiths v. *Vere.*

Soon after the passing of the Thellusson Act, it was decided, in the case of *Griffiths* v. *Vere* [2], that any direction which contravened the provisions of the Act was void only for the excess, and not, as a limitation contravening the Rule against Perpetuities would be, void *ab initio*. But a very recent statute, the Accumulations Act, 1892 [3], has rendered the Rule against Accumulations more strict, by providing that no one shall direct accumulation of income for the purpose of purchasing land only, for a longer period than the minority or minorities of any person or persons who would, if of full age, be entitled to such income. The Act of 1892 does not prescribe any penalty for the breach of its provisions, and its wording is by no means the same as that of the Thellusson Act, upon which the decision in *Griffiths* v. *Vere* [4] was based.

Legal remainders.

It seems to be somewhat uncertain, at the present day, whether the Rule against Perpetuities applies to legal contingent remainders. Lord St. Leonards, in the great case of *Cole* v. *Sewell* [5], evidently thought that it did not; but recent *dicta* show an inclination to confine Lord St. Leonards' doctrine to those legal remainders which are limited to a person who will necessarily be in existence when the limitation takes effect [6]. Notwithstanding this doubt, however, and notwithstanding the recent statutory alterations in the law of contingent remainders [7], it is still often of great importance to know

[1] 40 Geo. III. (1800) c. 99. § 2.
[2] (1803) 9 Ves. Jr. 127.
[3] 55 & 56 Vict. c. 58.
[4] (1803) 9 Ves. Jr. 127.
[5] (1843) 4 Dr. & Warren, 1, at p. 28.
[6] *Frost* v. *Frost* (1889) 43 Ch. D. 246.
[7] 8 & 9 Vict. (1845) c. 106. § 8; 40 & 41 Vict. (1877) c. 33.

whether a given limitation is to be construed as creating an executory interest or a contingent remainder. Thus, suppose a limitation over in favour of a class of persons, some of whom do and some of whom do not qualify under the Rule against Perpetuities. If the gift is to be read as a contingent remainder, those who do qualify, by being ready to take immediately on the expiry of the particular estate, acquire the whole of the interest [1]. If it is construed as an executory limitation, it will fail, as being void for remoteness [2]. And, as respects limitations created before the passing of the Contingent Remainders Act, 1877, it is exceedingly easy to imagine cases which would be invalid if construed as contingent remainders, valid if treated as executory interests.

Remainders and executory interests.

Thus, it is important to know the rule to be, that any limitation, in a deed or will, which can be construed as a remainder (i. e. as an interest to take effect after the normal expiry of a previous interest), must be so construed, and not as an executory interest. The rule was laid down in emphatic and unqualified language by Lord St. Leonards, in *Cole* v. *Sewell* [3]; and, it is conceived, still exists, having been clearly recognized by recent authorities [4]. But it has recently received the very important qualification that, if such a construction would manifestly defeat the object of the parties, it will not be adopted [5]. In other words, the rule is a rule of construction, and not of law.

Powers.

Before concluding the subject of *estates in futuro*, it is necessary to speak of what may be called the indirect creation of such interests, by way of Powers. The person creating the original limitation may not immediately specify in all cases the object of the limitation; he may leave that to be

[1] *Mogg* v. *Mogg* (1815) 1 Mer. 654.

[2] *Stuart* v. *Cockerell* (1870) L. R. 5 Ch. App. 713. It will be noticed hereafter (p. 137) that the Rule against Perpetuities does apply to *equitable* contingent remainders.

[3] (1843) 4 Dr. & W. at p. 27.

[4] *Lechmere* v. *Lloyd* (1881) 18 Ch. D. at p. 528; *Symes* v. *Symes*, 1896, 1 Ch. 272.

[5] *Blackman* v. *Fysh*, 1892, 3 Ch. 209.

settled by himself or some other person at a future date. The person in whom the right to make such a nomination is vested, is said to have a Power, i. e. a right, not arising out of the fact of ownership, to dispose of property. Of course, this is a restricted and technical use of the word 'Power'; which, in its widest sense, covers the authority of a person to dispose of interests vested in him as owner, as well as authorities to do acts other than those of disposition.

Classifications of powers.

Powers, in this restricted sense, are conveniently classified according to their (*a*) origin, (*b*) effect, (*c*) objects.

Origin.

(*a*) Powers are classified according to their *origin* into Common Law Powers, Equitable Powers, and Powers under the Statute of Uses.

Common Law Powers.

Common Law Powers are those conferred by the common law or by some statute other than the Statute of Uses—e. g. a Power to executors to sell lands for the payment of debts when there has been a devise to that effect, or any of the numerous Powers of disposition conferred upon the tenant for life by the Settled Land Act, 1882[1].

Equitable Powers.

Equitable Powers are those which a court of Equity alone would have recognized before the passing of the Judicature Act, and which operate upon equitable interests only.

Powers under Statute of Uses.

Powers under the Statute of Uses are by far the most important in the creation of future estates. They operate by way of 'declaring' or 'leading' the uses of a former conveyance. Thus, to take the simplest case, *A* conveys 'to *B* and his heirs, to the use of *B* for life, and, after *B*'s decease to the use of such of *B*'s children as *B* shall by deed or will appoint, and, in default of appointment, to the use of *X* and his heirs.' Before the Statute of Uses, the exercise of *B*'s power of appointment would merely have conferred on the appointees an equitable claim against *B*'s heir to the profits of the land. But now, by virtue of the statute, *B*'s appointment operates immediately to execute the use in his appointees, by way of remainder if *B* be living, in immediate enjoyment if *B* be dead. The remainder to *X* and his heirs will, of

[1] 45 & 46 Vict. c. 38.

course, be invalid as an executory limitation; but it will be good as a legal remainder[1].

(*b*) Powers are classified according to their *effect* into Powers Collateral, Powers Appendant, and Powers in Gross. Effect.

A Power Collateral is a power exercisable by a person who has no interest in the land over which the Power is to be exercised. It was formerly held[2], that such a Power was in the nature of a trust, and that, although the donee of the power need not exercise it, he could not bind himself not to do so, nor could he extinguish or release it. But the law has now been altered by the Conveyancing Act, 1881[3], which provides that a person to whom *any* Power is given may, by deed, release or contract not to exercise the same. It seems to be a curious feature of a Collateral Power that it can be exercised by an infant, by act *inter vivos*[4]. Powers collateral.

A Power Appendant is a Power vested in a person who has also an estate or interest in the land over which it is to be exercised, and which will, if exercised, affect his own interest. The Power given to a husband in a marriage settlement, to appoint a term to raise pin-money for a future wife, is a Power Appendant, if it will take effect in derogation of his own life estate. Powers appendant.

A Power in Gross is likewise vested in a person who has an interest in the land over which it is to be exercised; but is such that its exercise will not defeat or affect his own interest. A good example is the Power given to a tenant for life by a settlement to appoint a term to raise portions for his younger children after his decease[5]. Powers in gross.

(*c*) Powers are classified according to their *objects* into General and Special Powers. A General Power can be exercised by the donee in favour of any person whom he pleases. Thus a conveyance 'to *A* and his heirs, to the use of *B* for life, and after *B*'s decease to the use of such persons Object. General powers.

[1] *Re Abbott*, 1893, 1 Ch. 54.
[2] *Willis* v. *Shorral* (1738) 1 Atk. 474.
[3] 44 & 45 Vict. c. 41. § 52.
[4] *Re D'Angibau* (1880) 15 Ch. D. 228.
[5] Classification of Jessel, M. R., in *Re D'Angibau*.

as *B* shall appoint and their heirs,' creates a general Power of appointment in *B*. The effect of such a Power is, virtually, to make *B* owner of the land to the extent of the interest covered by the Power. And this effect has been recognized by the law. For a general devise in a Will passes all property over which the testator has a general Power of appointment [1]; and such property will be divisible among the creditors in bankruptcy of the donee of the Power [2], and, if the Power is actually exercised, form part of his assets on his decease [3]. It will also be available for judgement creditors under the Judgments Act of 1838 [4]. The mere fact that such a Power is to be exercised in a particular manner, e. g. by Will, does not prevent it being a General Power [5].

Special powers.

On the other hand, Special, or, as they are sometimes called, 'Limited' Powers, are Powers which the donees are bound to exercise, if at all, in favour of a member or members of a limited and clearly defined class. Thus, a conveyance 'to *A* and his heirs to the use of *B* for life, and, after *B*'s death, to such of the children of (the settlor) as *B* shall appoint,' creates a Special Power in *B*, which can be exercised only in favour of the settlor's children. Although *B* should himself be a member of the class contemplated by the Power, the property will not pass under a general devise in his Will; but such a Special Power seems (if exercised) to be within the wording of the Judgments Act, 1838 [6], and the Bankruptcy Act, 1883 [7].

Illusory appointments.

At one time the subject of Special Powers was affected by a doctrine peculiarly difficult to interpret, the doctrine of

[1] Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), § 27.

[2] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), § 44. But the power must be exercised by the trustee during the debtor's lifetime. *Nichols to Nixey* (1885) 29 Ch. D. 1002.

[3] *Fleming* v. *Buchanan* (1853) 3 D. M. & G. 976. The rule applies even where the donee of the Power is a married woman (*Re Hughes*, 1898, 1 Ch. 529).

[4] 1 & 2 Vict. c. 110. § 13.

[5] *Hawthorn* v. *Shedden* (1856) 3 Sm. & G. 293; but the property is not available by the creditors in bankruptcy if no Will be actually made. *Nichols to Nixey* (1885) 29 Ch. D. 1002.

[6] 1 & 2 Vict. c. 110. § 13. [7] 46 & 47 Vict. c. 52. § 44.

Illusory Appointments. It was held that if *A* had power to appoint amongst a class, the Power was not well exercised by an appointment which wholly omitted any member of the class, or even by an exercise which gave to any member an 'unsubstantial, illusory, or nominal' share of the property. The first part of the rule, though arbitrary, was easy of application. But what was an 'unsubstantial, illusory, or nominal' share under the second? Evidently nothing but a judicially sanctioned table of proportions would have satisfactorily answered that question, which, accordingly, was a frequent source of litigation, till that branch of the doctrine was abolished by statute in 1830[1]. The other branch lingered on until 1874[2]. And it is now clearly settled, that, unless an intention to the contrary manifestly appear by the terms of the settlement, the objects of a Special Power have no claim to the property in default of appointment[3].

Powers and Perpetuities

There is, however, one point of law connected particularly with Special Powers, which it is most important to bear in mind. The Rule against Perpetuities applies equally to interests created by virtue of Powers as to interests directly created by the conveyance to Uses. But, in the case of General Powers, the period of perpetuity is reckoned to begin from the *exercise* of the Power, on the ground that the existence of a General Power does not in any way fetter the free alienation of the property. While, in the case of a Special Power, the period of perpetuity commences, not from its exercise, but from its *creation*[4]; on the ground that the alienation of the property is restricted by its very existence. Thus, a limitation 'to *A* and his heirs, to the use of *B* for life, remainder to the use of *B*'s eldest son (unborn) for life, with remainder to such of his (*B*'s eldest son's) children as he (*B*'s eldest son) should appoint and their heirs,' would be bad, both as a remainder and as an executory interest. It would be bad as a remainder,

[1] 11 Geo. IV. & 1 Will. IV. c. 46. § 1. The appointment had previously been good at Law, but not in Equity.

[2] 37 & 38 Vict. c. 37.

[3] *Weeke's Settlement*, 1897, 1 Ch. 289.

[4] *Griffith* v. *Pownall* (1843) 13 Sim. 393.

because it attempts to limit an estate to an unborn person for life, followed by an estate to the issue of such unborn person[1]; it would be bad as an executory interest, because it could not be effected without tying up the estate beyond a life in being and twenty-one years[2]. But if a Special Power can be executed, and is executed, without infringing the Rule against Perpetuities, it will be good, notwithstanding that some of the objects of the Power may contravene the rule[3]. Thus, a Power to an unborn person to appoint in favour of any of the settlor's descendants living at his (the donee's) decease, would be validly exercised by an appointment to persons born in the settlor's lifetime or twenty-one years after.

Execution of powers.

Finally, it may be observed that, as a general rule, the form prescribed by the creator of the Power for its exercise must be strictly observed. Thus, a Power to appoint by deed is not well exercised by an appointment by Will[4]; and, *a fortiori*, a power to appoint by Will is not validly exercised by an appointment by deed[5]. But two statutes have relaxed something of the excessive strictness with which the exercise of Powers was once regulated. By the Wills Act, 1837[6], a Will executed in accordance with the requirements of the Act is a valid exercise of any power of appointment required to be exercised by Will. And by Lord St. Leonards' Act of 1859[7], a Power exercised by deed or other writing not testamentary is validly exercised by the execution of an indenture attested by two witnesses, although the instrument creating the Power may prescribe other formalities. Courts of Equity formerly had, and now all branches of the High Court have, considerable discretionary jurisdiction to aid the imperfect exercise of Powers; but this subject belongs to that branch of the Law which is still called Equity.

Wills Act.

Lord St. Leonards' Act.

[1] Ante, p. 99. [2] Ante, p. 117. [3] *Griffith* v. *Pownall* (1843) 13 Sim. at p. 396.

[4] *Earl of Darlington* v. *Pulteney* (1775) Cowper, 260.

[5] *Reid* v. *Shergold* (1805) 10 Ves. Jr. at p. 379.

[6] 7 Will. IV. & 1 Vict. c. 26. § 10. And the observance of the requirements of the Act is not only sufficient, but essential.

[7] 22 & 23 Vict. c. 35. § 12. But the Power *may* be exercised in any other manner conformable to the terms of its creation.

CHAPTER VIII.

INCORPOREAL HEREDITAMENTS. 2. EQUITABLE INTERESTS.

It is a moot point whether or no the framers of the Statute of 1535 intended to destroy uses[1]. But, whichever view we take of this question, there can be little doubt that they intended to destroy uses as they were understood at the passing of the statute—viz. as privileged interests not subject to the rules of the common law. It was their obvious intention, that all the incidents which attached to the legal estate of the person seised, should also attach to the interest of the *cestui que use*.

Revival of equitable interests.

It has, however, been frequently observed, that even the omnipotence of an Act of Parliament is powerless to restrain a practice imperatively demanded by the needs of the community. And as, in the sixteenth century, society was rapidly coming to look upon feudal principles as antiquated and cumbersome, as, in effect, social affairs came to be less and less regulated by feudal ideas, the need of a system of conveyancing which should enable non-feudal interests in land to be created, became more and more pressing. Accordingly, we need not be surprised to discover, that means of evading the statute were invented shortly after its passing.

Tyrrel's Case.

The most important of these evasions is that which owes its formal existence to the decision in *Tyrrel's* Case. In the year 1535, the Statute of Uses was passed. In the year

[1] Saunders on *Uses*, pp. 125 et seq.

1557, a decision in the Court of Wards, by the Chief and all the Justices of the Common Bench, laid it down that the statute would only execute the first of a series of uses, leaving all subsequent uses to such operation as a court of Equity might choose to give them[1]. In this decision the Court professed to be guided by the somewhat mysterious maxim, that 'an use cannot be ingendered of an use.' But the judges, although, be it observed, they were common law judges, must have perfectly well known that the effect of their decision would be to enable the Court of Chancery to open its arms and welcome back its lately lost jurisdiction over equitable interests in land.

Bargain and sale.

Tyrrel's Case was an especially decisive one, because the actual word 'use' was not employed in the first limitation. It was the case of a bargain and sale to *G*, to the use of *J* for life, remainder to the use of the said *G* in tail, remainder to the use of the said *J* in fee. But, as we have seen[2], a bargain and sale for valuable consideration (as there was in *Tyrrel's* Case) was construed by the Court of Chancery before the Statute of Uses, and by the common law courts after the statute, as constituting the bargainor (vendor) a person seised to the use of the bargainee (purchaser). And *this* was the use which the judges in *Tyrrel's* Case allowed the statute to have executed. The later uses were, as they said, 'void and impertinent,' because they were limited upon the use previously raised by implication from the bargain and sale. But, of course, a court of equity would not allow the bargainee in such a case to hold the land for his own benefit. It treated him just as though he had been 'seised to uses' before the statute. And so the existence of equitable interests was once more assured, by the simple process of limiting them after a previous limitation to uses; or, as was said in *Hopkins* v. *Hopkins*[3], it became only necessary to add 'three words to a conveyance.'

[1] *Tyrrel's* Case (1557) Dyer, 155.

[2] Ante, p. 110.

[3] (1738) 3 Atk. at p. 591.

This was, no doubt, the most important means of reviving equitable interests. But there were other cases which did not fall within the statute. Thus, the statute only covered the case of persons *seised* to the use of others. Now a man cannot be *seised* of a term of years[1], although he can be seised of a freehold to the use of another for a term of years. And it was, therefore, early settled, that a limitation of a term of years to *A* to the use of *B*, did not give *B* a legal interest under the Statute of Uses, but only an equitable interest, or trust[2]. A similar result followed in the case of a limitation of a copyhold tenement; for the Statute of Uses does not apply to copyholds[3]. Again, a corporation cannot be seised to a use; and it will be observed that the Statute of Uses very carefully avoids making any such supposition, although it was specially aimed at the converse case, of individuals being seised to the use of corporations. But courts of equity constantly held that corporations could be bound by equitable interests, at least when those interests were limited in favour of charities[4]. And, whether or no a tenant in tail can be seised to the use of another, in the sense that the statute will execute the use, it is clear that, by such a limitation, he will be bound by a trust[5].

Other evasions of the statute.

Lease-holds.

Copy-holds.

Corpora-tions.

Estates tail.

But a still more important doctrine tended to the resurrection of equitable interests after the Statute of Uses. For it was held that the statute only applied to cases in which the feoffee to uses had no active duty to perform, but was a mere conduit-pipe for conveying the interest to the *cestui que use*. In other words, where a feoffee to uses was required to do any positive act, such as to manage the property or collect the rents, his seisin was not a seisin

Active trusts.

[1] Ante, p. 112.

[2] *Anonymous* of 1580, Dyer, 369 a. The decision was a very strong one, as it was an answer of all the Justices and the Chief Baron to a question propounded by the Chancellor.

[3] *Rowden* v. *Malster* (1620) Cro. Car. 44.

[4] Case of *Sutton's Hospital* (1612) 10 Rep. 23.

[5] *Ex parte Johnson* (1747) 3 Atk. 559. (But in this case the trust was created before the limitation to the tenant in tail.)

to uses, but a seisin to trusts[1]. And this doctrine places in the category of equitable interests many limitations which might appear, from the employment of the word 'use,' to fall within the statute. On the other hand, the student must never forget, that, as was said in the last chapter, the employment of the actual word 'use' is not essential to bring the limitation within the statute. It is the intent of the parties, as appearing by the document, and not the precise words employed, which will decide whether the interest in question is legal or equitable[2].

It will be seen then that, as was said by the Court in the case of *Symson* v. *Turner*[3], decided in the year 1700, there are still three ways in which it is possible to create a use or trust which will not be executed by the statute—viz. (1) by limiting a use or trust upon a term of years (to which might be added, a copyhold); (2) by limiting to *A*, to the use of or in trust for *B*, to the use of or in trust for *C* (for here the statute will only execute the first use); (3) by limiting to trustees with active duties to perform. And into one of these three classes all cases of *express* trusts will probably be found to fall.

Implied trusts.

But there are also many cases in which the Courts will *imply* the existence of an equitable interest, although there be no express attempt to create it. And the interest thus implied will be treated by the Courts as though it were an interest deliberately created by the parties. The two most important examples of this class are Resulting Trusts and Equities of Redemption. The first arise whenever the owner of a legal estate disposes of it, with the clear object of effecting certain specific purposes which do not exhaust the whole of the legal estate, or when a conveyance for which *A* finds the money is taken in the name of *B*. Thus, if *A*, tenant in Fee Simple, convey the whole of his legal estate by way of settle-

Resulting trusts.

[1] See the cases collected in 1 Equity Cases Abridged, pp. 382–4.

[2] This rule was clearly recognized in the recent case of *Van Grutten* v. *Foxwell*, 1897, A. C. 658.

[3] Referred to in 1 Eq. Ca. Abridged, 383.

ment to trustees, in trust for the benefit of his intended wife and future children, and then, the marriage having been solemnized, the wife die leaving no issue, the purposes of the settlement are exhausted. But the trustees are not entitled to the estate for their own benefit; they will hold as trustees for *A*, the settlor[1]. And so, if a legal estate be conveyed to *B*, but *A* pays the purchase-money, wholly or in part, then, unless *A* stand *in loco parentis* towards *B* (in which case the transaction is looked upon as a gift or 'advancement' to *B*[2]), *B* will be held to be a trustee for *A*, to an extent representing the latter's purchase-money.

Equities of redemption.

An Equity of Redemption, which may also be considered as an example of a Resulting Trust, arises whenever an interest, legal or equitable, is conveyed by its owner as security for money, even though the conveyance be in terms absolute, and nothing be said about redemption. It is now a well-established rule, that if *A* convey to *B* as security for money, *B*, despite all provisions to the contrary in the conveyance, will be treated by the Courts as at least a quasi-trustee for *A* in respect of any surplus value of the estate over the amount claimable by *B* for principal, interest, and costs[3]. And if *B* has sold the land to realize his money, he will, in like manner, be treated as quasi-trustee of the surplus money, which will be looked upon as land till actually paid over to *A* or his representatives[4].

It will thus be seen that there is no lack of examples of equitable interests, express or implied; and although the fusion of Law and Equity by the Judicature Act has rendered the term 'equitable interest' perhaps slightly anomalous, yet the necessity of finding a term to distinguish those interests

[1] *Cottington* v. *Fletcher* (1740) 2 Atk. 155; or his representatives (*Ackroyd* v. *Smithson* (1780) 1 Br. Ch. Ca. 503).

[2] *Dyer* v. *Dyer* (1788) 2 Cox, 92.

[3] *Casborne* v. *Scarfe* (1737) 1 Atk. 603.

[4] *Charles* v. *Jones* (1887) 35 Ch. D. 544. See the rule carried to its extreme length by the House of Lords in the recent case of *Salt* v. *Marquis of Northampton*, 1892, A. C. 1. The subject of Equities of Redemption will be dealt with under Mortgages (Post. Cap. xxiv).

in land which, before the passing of the Judicature Acts, would only have been recognized by a court of Equity, and which still, in spite of those Acts, are clearly to be distinguished from legal interests, has perpetuated the name.

'Unto and to the use of.'

But, before proceeding to speak of the special characteristics of equitable interests, we may pause upon a small but highly important point in a common form of limitation by which equitable interests are created. A conveyance 'unto and to the use of *A* and his heirs to the use of (or in trust for) *B*' is construed, as all conveyancers know, to give only an equitable interest to *B*. But it is not always perceived that this rule is the result of convenience, rather than of logic. For it will be remembered that the Statute of Uses executes only uses to which a man is seised 'to the use, trust, or confidence of any *other* person or persons[1].' And, therefore, in the case put, the use in favour of *A* is not executed by the statute, because *A* is seised to his own use. And it was early decided that, in such a case, *A* is in by the common law, not by the statute, the use to him being treated as mere surplusage[2]. But the logical result of these premises would be that the use to *B was* executed by the statute, so as to confer a legal estate on *B*. This result, however, would have upset so many settlements, that the Court of King's Bench in the year 1827, in the case of *Doe* v. *Passingham*[3], decided that *A* was in of the estate *clothed with the use*, which would, therefore, prevent the execution of the subsequent use by the statute.

Characteristics of trusts.

It is the common saying, that trusts have, by virtue of the decisions alluded to in the preceding paragraphs, been put upon the footing of uses before the statute; and, though that generalization has been criticized by a very learned writer[4], it is sufficiently true to say that, in order to arrive at the general notion of an equitable interest in land, the student must carry his mind back to the origin of uses. We saw, as

[1] 27 Hen. VIII. (1535) c. 10. § 1.
[2] *Meredith* v. *Joans* (1632) Cro. Car. 244.
[3] 6 B. & C. 305.
[4] Saunders, *Uses*, p. 233.

will be remembered, that these limitations were invented for the purpose of vesting in certain persons the beneficial interest in land, unfettered by the liabilities and technical rules affecting legal estates. It was also pointed out, that a natural tendency manifested itself on the part of judges and legislators to act upon these limitations in a twofold direction, viz. to attach to the equitable interest as many legal incidents as possible, and to remove similar incidents from the corresponding legal estate. And this tendency, despite the short suspension of equitable interests occasioned by the Statute of Uses, and the determination of the courts of Equity to protect equitable interests from the influence of technical rules, has gone on manifesting itself, until at the present day a superficial observer might readily (but rashly) assume, that the difference between legal and equitable interests was one of name only.

This is not a historical treatise; and we cannot, therefore, enter upon the history of this very interesting developement. But there will be no harm in affixing proximate dates to the introduction of the various changes in the state of the law, which have resulted in the close assimilation of the equitable to the legal interest. Let us begin with the process which relieved the estate of the trustee from incidents which might have damaged the equitable interest.

The feoffee to uses.

But first it should be premised, that the effect of the Statute of Uses was to do away with all claims against the estate of the feoffee to *uses*. The mere momentaneous seisin which serves as the conduit-pipe to convey the legal estate to the *cestui que use* by virtue of the statute, gives its holder no estate out of which incidents of tenure can arise. So clear was this result, that it does not seem to have been ever disputed in a court of Law. But more than one writer of credit has thought fit to mention it[1].

Liabilities of the legal estate.

On the other hand, it was long before the equitable interest was completely protected from the incidents of tenure affecting the corresponding legal estate. Thus, in 1630, the Court

[1] Blackstone, *Comm.* II. 333; Saunders, *Uses*, 167.

Dower. refused to relieve against the widow of a trustee who claimed dower[1]; but in 1678 the decision was the other way[2].

Curtesy. Women were so rarely made trustees until quite lately, that the question of the liability of a trustee's estate to her husband's Curtesy seems never to have been actually decided. Chief Baron Gilbert, who wrote at the beginning of the eighteenth century, thought it would be liable[3]; but his learned editor, Sir Edward Sugden, writing in 1811, thought it would not[4], and he is confirmed by the slightly earlier authority of Sanders[5]. The legal guardian of an infant trustee certainly became guardian of the estate[6]; but probably, if a private person, he was held liable to perform the trust, on the ground that he took only what the infant had. The somewhat vaguely worded statute of 1541[7], which created the Court of Survey, was afterwards used as a pretext for enforcing similar equitable claims against the Crown[8]. Gilbert denies that any relief will be granted to the *cestui que trust* whose trustee suffers an escheat[9]; but Lord Keeper Bridgman in 1666[10], and in 1702 Sir John Trevor, M. R.[11], had said just the contrary, the former in the case of felony, the latter in the case of the trustee's death without heirs[12]. In the matter of forfeiture for treason, there was long a vague reliance upon the 33 Hen. VIII. c. 39; but, in the year 1667, Chief Baron Hale, in the great case of *Pawlett* v. *Attorney-General*[13], gave legal relief to a mortgagor who claimed to be protected, in regard to his equity of

Guardianship.

Escheat.

Forfeiture.

[1] *Nash* v. *Preston*, Cro. Car. 190. [2] *Noel* v. *Jevon*, Freem. Cha. Ca. 43.

[3] *The Law of Uses and Trusts*, p. 11.

[4] Note 1, p. 18 of ed. of 1811. [5] *Uses*, p. 254.

[6] *Coningsby* v. *Throckmorton* (1516) Keilway, 176, pl. 1.

[7] 33 Hen. VIII. c. 39. § 58 'of right or equity.'

[8] *Whitehill* v. *Attorney-General* (1665) Hardres, 395.

[9] op. cit. p. 10. [10] *Geary* v. *Bearcroft*, Cart. at p. 67.

[11] *Eales* v. *England*, Pre. Ch. at p. 202. Gilbert's view, however, was not without support in his own day, Jenkins, *Cent.* 190.

[12] In the case of a copyhold tenement, the lord could certainly claim by escheat unless he had express notice of the trust at the time of the admittance of the trustee. *A.-G.* v. *Duke of Leeds* (1833) 2 Myl. & K. 343.

[13] Hardres, 465.

redemption, against the forfeiture of the mortgagee's estate for treason. Still, Sir Matthew Hale distinctly guards himself against applying the rule to all trusts[1]; and Saunders, though he inclines to think relief will be granted, cannot quote any judicial authority[2]. It was, however, enacted by the Trustee Act of 1850[3], that no land should suffer escheat or forfeiture for any *offence* of a trustee or mortgagee. And it is unquestionable now that a lord claiming by escheat for want of heirs of a trustee would be bound to perform the trusts[4].

Trustees debts.

The lands of a debtor were in early times not very readily available by his creditors for payment of debts; so there is not very much authority on the question of how far the estate of a trustee could be jeopardized on this account. But it was clearly recognized in the case of *Finch* v. *Earl of Winchelsea*, decided in 1715[5], that the judgement creditors of a trustee, even though they proceeded to execution, could not get at the trust estate; and it appears that just at the same time the Court of Chancery laid down the rule that the bankruptcy of the trustee would not affect the interests of his *cestuis que trustent*[6]. This rule has, of course, since been made the subject of express legislation[7]. It was only recently in the history of law that the land of a deceased debtor became liable for his debts; except in the case of Crown debts, and specialties in which the heir was bound[8]. But a very useful decision of the year 1673 shows that, even in such cases, the creditors of the deceased trustee were not allowed to enforce their claims against the trust estate[9]. The claims of creditors were later extended through the agency of the Court of

[1] Hardres, p. 467. [2] *Uses*, p. 253.

[3] 13 & 14 Vict. c. 60. § 46. There had been a previous temporary statute in 1834 (4 & 5 Will. IV. c. 23).

[4] 13 & 14 Vict. c. 60. §§ 15, 19.

[5] 1 P. Wms. at p. 278. And see *Medley* v. *Martin* (1673) Ca. temp. Finch, 63.

[6] *Ex parte Chion* (1721) 3 P. Wms. 186 n. Followed immediately by the well-known decision in *Bennet* v. *Davis* (1725) 2 P. Wms. 316.

[7] 46 & 47 Vict. c. 52. § 44 (1) (Bankruptcy Act, 1883).

[8] See post, cap. xv. [9] *Medley* v. *Martin*, Ca. temp. Finch, 63.

Chancery, which, naturally, took care to protect *cestuis que trustent* against the claims of their trustees' creditors. But it need hardly be said that such legal incidents as rents, reliefs, fines, and heriots, which are in the nature of profits, are payable by the trustee in respect of his legal estate, and may be by him deducted from the produce receivable by the *cestuis que trustent*. Moreover, a person claiming by title *bona fide* hostile to that of the trustee, is not bound by the trust[1]. Such a person in old days would have been called a disseisor; and, though the importance of seisin is now much less than it was, the principle is followed. Thus, an express trustee cannot plead the Statute of Limitations against his *cestui que trust*[2]; but a person who has deprived him of the estate by hostile claim can do so[3].

Liabilities of the equitable interest.

Turning now to the other side of the case, the tendency to put the equitable interest upon the footing of the legal estate, we find much less difficulty in tracing the course of events.

Dower.

The widow of a *cestui que trust*, even though the latter's interest were of the *quantum* of a fee, never succeeded in obtaining dower, either in socage[4] or copyhold[5], until it was conferred upon her by express statute in 1833[6]. On

Curtesy.

the other hand, in *Sweetapple* v. *Bindon*[7], followed by *Casborne* v. *Scarfe*[8], it was decided that the husband should have

Guardianship.

Curtesy out of his wife's equitable interest. No guardianship by tenure can be claimed of an equitable interest, which is not the subject of tenure. And, after some doubt, it

Escheat.

was decided, for the like reasons, in the great case of *Burgess* v. *Wheate*[9], and against the opinion of Lord Mansfield, that

[1] *Sir Moyl Finch's* Case (1600) 4 Inst. 84.

[2] 3 & 4 Will. IV. (1833) c. 27. § 25.

[3] *Scott* v. *Scott* (1854) 4 H. L. C. at p. 1071.

[4] *Colt* v. *Colt* (1664) 1 Cha. Rep. 134.

[5] *Forder* v. *Wade* (1794) 4 Bro. C. C. 520. Sir Charles Elton (*Copyholds*, p. 162 n) quotes this case as an authority for the proposition that the widow of a trustee cannot claim freebench. But that point was not discussed.

[6] 3 & 4 Will. IV. c. 105. § 2.

[7] (1705) 2 Vern. 536.

[8] (1737) 1 Atk. 603.

[9] (1759) 1 Ed. 177; followed (for copyholds) by *Gallard* v. *Hawkins* (1884) 27 Ch. D. 298.

an equitable interest did not escheat on failure of the heirs of the *cestui que trust*, but became extinct for the benefit of the legal estate. This decision which, it is submitted, is strictly in accordance with principle, governed the law on the subject until the passing of the recent Intestates' Estates Act, 1884[1], by which, in the event of any person dying intestate and heirless in respect of any real estate consisting of any equitable interest, whether it is devised by him to trustees or not, the law of escheat is to apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments. The aim of the draftsman of this most extraordinary section was probably to increase the revenues of the Crown; but how an interest which is not held of any lord can escheat to a lord for want of heirs, or how a man can be said to die intestate as to that which he has devised, are problems which it will require considerable ingenuity to solve. Intestates' Estates Act.

On the other hand, express statutes of the years 1541 and 1552 extended to equitable interests of inheritance the liability to forfeiture for treason[2]; and equitable terms of years were always forfeitable, as chattels, to the Crown, on the commission of felony by the *cestui que trust*[3]. The almost total abolition of forfeiture for crime which has recently taken place, renders the subject of little present importance[4]. Forfeiture.

In the matter of liability for debts, equitable interests very early received a recognition which was not, perhaps, altogether welcome to their owners; for the Statute of Frauds[5] not only rendered them liable to attack by creditors during the lifetime of the debtor, through the medium of execution and statutes merchant, but made equitable interests in fee simple liable as assets by descent in the hands of the heir. For some little time after the passing of the Act, it was doubted whether Creditors' claims.

[1] 47 & 48 Vict. c. 71. § 4.
[2] 33 Hen. VIII. c. 20. § 2; 5 & 6 Edw. VI. c. 11. § 9.
[3] Hale, C. B. in *Paulett* v. *A.-G.* (1667) Hardres, at p. 467.
[4] 33 & 34 Vict. (1870) c. 23. § 1.
[5] 29 Car. II. (1677) c. 3. § 10.

it applied to equities of redemption[1]. But the doubt was silenced by the decision in *Sawley* v. *Gower*[2].

When it is further remembered that courts of Equity, despite their care to protect equitable interests, have steadily adhered to the policy of assimilating them to legal estates, in all matters such as construction of words and limitation of successive interests, except where such a construction would manifestly defeat the intention of the parties[3], the student may well begin again to wonder whether, after all, the difference between a legal estate and an equitable interest is not one of name only. Equitable interests can be limited in fee, tail[4], for life, or years in the same manner as legal estates, and by the same words[5]; and the respective rights and liabilities attaching to each, in respect of each other, will be the same as in the corresponding legal estates. If they be interests of inheritance, they will descend according to the rules affecting the legal estate out of which they are created[6]. They will, generally speaking, be subject to the same rules of construction and limitation as common law interests; except where such a construction would manifestly defeat the intention of the parties. It is true that, *as against an express trustee*, the Statute of Limitations does not bar the rights of

[1] *Plucknet* v. *Kirk* (1686) 1 Vern. 411.

[2] (1688) 2 Vern. 61.

[3] And, even in such an event, the Courts have not hesitated in some cases to apply the rules of law, e. g. the Rule in *Shelley's* Case.

[4] But, occasionally, expressions which in strict law would create an estate tail, are held in respect of equitable interests to limit estates for life with contingent remainders to the issue as purchasers. *Bagshaw* v. *Spencer* (1748) 2 Atk. 570.

[5] *Whiston's Settlement*, 1894, 1 Ch. 661.

[6] *Cowper* v. *Cowper* (1734) 2 P. Wms. at p. 737. It is interesting, however, as an example of the prevalence of law over equity, to notice that if an equitable interest come to *A* by descent *ex parte paterna*, and the legal estate out of which it is created devolve on the same person by descent *ex parte materna*, the beneficial property will, in the event of *A* becoming the stock of descent (under 22 & 23 Vict. (1859) c. 35. § 19), go to his relatives *ex parte materna*. *Goodright* v. *Wells* (1711) Douglas, 741. Mr. Justice Willes (p. 748) suggested that the maternal heirs might possibly take subject to a trust for the paternal. But the other three judges repudiated the suggestion.

the person in whom the equitable interest is vested[1]; but as against all other parties, including a quasi-trustee and a trustee by operation of law, he is in the same position as the owner of a legal estate[2]. It is interesting also to notice that the Rule against Perpetuities applies to the creation of equitable contingent remainders, though it is doubtful if it affects legal limitations by way of remainder; the reason being, that the seisin of the trustee prevents the failure of the remainders upon the determination of the particular estate[3]. It would seem, however, that equitable contingent remainders are *also* subject to the rule against double possibilities[4].

Differences between legal and equitable interests.

Nevertheless, it would be exceedingly rash to conclude that, even since the fusion of Law and Equity by the Judicature Act[5], there are no substantial differences between an equitable interest and a legal estate. Such differences exist. We may consider them under the three heads of (1) rights over the land, (2) alienation, (3) protection against third parties.

Possession.

1. *Rights over the land.* It is perfectly clear that, before the passing of the Statute of Uses[6], the feoffee to uses, and not the *cestui que use*, was treated at law as owner of the land. Thus the former, on rendering fealty to the lord, became legal tenant[7], and exercised all the powers of an owner, including even the filling up of ministerial offices, such as the stewardship of a manor[8]. If the *cestui que use* were in actual occupation (as he frequently was), it was as a mere occupant at will, and the feoffee might maintain the action of trespass against him[9]; while he could not even justify for seizing

[1] 3 & 4 Will. IV. (1833) c. 27. § 25.

[2] *Petre* v. *Petre* (1853) 1 Drew. 371. Even the right against the express trustee is greatly modified by the Trustee Act, 1888 (51 & 52 Vict. c. 59), § 8, and the Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), § 3.

[3] *Abbiss* v. *Burney* (1881) 17 Ch. D. 211.

[4] *Monypenny* v. *Dering* (1852) 2 De G. M. & G. 145. The limitations in this case were treated as equitable by the Court (7 Hare, 575).

[5] 36 & 37 Vict. (1873) c. 66. § 24.

[6] 27 Hen. VIII. (1535) c. 10.

[7] *Faukener* v. *Pelham* (1425) Y. B. 3 Hen. VI. P. pl. 5, fo. 39.

[8] *Anon.* of 1493 (Y. B. 8 Hen. VII. P. pl. 3, fo. 11).

[9] *Anon.* of 1464 (Y. B. 4 Edw. IV. P. pl. 9, fo. 8).

the cattle of a stranger *damage feasants* [1]. And these doctrines were implicitly followed by courts of Equity in regard to the relation of trustee and *cestuis que trustent*. Thus, it is clear that the equitable 'tenant' for life has no right to possession of the land, although the Court may, in the exercise of its discretion, let him into occupation. In *Taylor* v. *Taylor*, decided in 1875, Sir George Jessel (and there could not have been a higher authority) said emphatically—'it is not the right of the (equitable) tenant for life to be in possession [2].' After the passing of the Settled Land Act, 1882 [3], a determined attempt was made to upset this doctrine, on the ground that the statute contemplated the equitable tenant for life as entitled to possession [4]. But, despite an unfortunate wavering in the case of *In re Wythes* [5], the Courts have refused to admit an inference which would have gone far to confound the very useful distinction between legal estates and equitable interests. It is now the settled rule, that the person entitled to the immediate income of the land is not, unless he be legal tenant, entitled also to possession; but that the Court, in the exercise of its discretion, and influenced by the requirements of the Settled Land Act, will let him into permissory occupation, if it can safely do so [6].

Powers. It followed from the fact that the owner of the equitable interest had neither the legal right nor the legal possession, that he could not exercise any of the powers nor avail himself of any of the remedies of a legal tenant. Thus, he could not distrain [7], nor bring actions [8], nor grant building leases [9], nor, *a fortiori*, convey the legal estate. On the other hand, the trustee in exercising his legal rights is bound to defer to the

[1] *Anon.* of 1499 (Y. B. 15 Hen. VII. M. pl. 1, fo. 13).

[2] L. R. 20 Eq. at p. 303. [3] 45 & 46 Vict. c. 38. [4] ib. § 2 (5).

[5] 1893, 2 Ch. 369.

[6] *Re Bagot*, 1894, 1 Ch. 177; *Re Newen*, 1894, 2 Ch. 297.

[7] The cases cited by Mr. Godefroi, *Trusts* (2nd ed.), 495, do not in the least establish the right of the *cestui que trust* to distrain.

[8] *Sharpe* v. *San Paulo Ry. Co.* (1873) L. R. 8 Ch. App. 597.

[9] But, as between himself and the tenant, the latter is estopped from raising the objection of want of title. *Parker* v. *Manning* (1798) 7 T. R. 537.

wishes of the *cestui que trust*, in so far as he can do so without being guilty of a breach of duty. Thus, in filling up a benefice of the advowson of which he is a trustee [1], or an office in the trust estate [2], he must appoint the nominee of the *cestui que trust*, if he be a suitable candidate. And now, by the combined effect of the Judicature Act, 1873, and the Conveyancing Act, 1881, a mortgagor in possession, though his interest is purely equitable, is entitled, if the mortgagee has not given notice of his intention to enter, not only to sue for breaches to his possession and to recover rents, but to make legally valid leases and perform other acts of ownership [3]. And an equitable so-called 'tenant for life' under a settlement is, as we have seen, entitled to exercise extensive powers of disposition and management [4]. By reason of the close analogy between legal estates and equitable interests, it would seem that, as between himself and other beneficiaries, the owner of a limited equitable interest is entitled to the same rights and subject to the same duties as legal limited owners. Thus, the equitable tenant for life may not, unless expressly made unimpeachable for Waste, commit any act which in a legal tenant for life would be Waste [5]. On the other hand, he is, if entitled to present beneficial enjoyment of the land, protector of the settlement under the Fines and Recoveries Act [6]. And, it would seem, he is entitled to *estovers*, and his representatives to *emblements*. An equitable tenant in tail may likewise bar the entail by proper methods [7].

Limited interests.

2. *Alienation.* The personal nature of the tie between trustee and *cestui que trust* was so obvious, that, for some time after the passing of the Statute of Uses, the Courts inclined strongly to hold that no alienation of the latter's interest was

Alienation.

[1] *Amhurst* v. *Dawling* (1700) 2 Vern. 401.

[2] *Mott* v. *Buxton* (1802) 7 Ves. Jr. 201.

[3] 36 & 37 Vict. c. 66. § 25 (5); 44 & 45 Vict. c. 41. § 18. As to the powers of a mortgagor, see post, cap. xxiv.

[4] Settled Land Act, 1882 (45 & 46 Vict. c. 38), §§ 3–20. Ante, pp. 49, 50.

[5] *Denton* v. *Denton* (1844) 7 Beav. 388.

[6] 3 & 4 Will. IV. (1833) c. 74. § 22.

[7] See post, cap. xxii.

valid, on the ground that the trustee might not care to act in that capacity towards a stranger[1]. But very soon the tide set clearly in the other direction; and every alienation of a trust, by conduct or word of mouth, was recognized as being valid. This dangerous doctrine was, however, severely qualified by the Statute of Frauds, which provided that no creation or declaration of any trust of lands, tenements, or hereditaments, other than trusts arising by implication of law, and no assignment of any trust, should be valid, unless made in writing signed by the maker thereof[2]. This enactment establishes the rule, at once simple and sufficient, that a written document, signed by the efficient party, is necessary to the creation and transfer of every express trust relating to lands, and that nothing else is necessary. The only exception to this rule appears to be that an equitable tenant in tail who desires to bar the entail must do so, if the land in question be socage, by a deed under the Fines and Recoveries Act, 1833[3], and, if the land be copyhold, either by surrender to the use of himself in fee, or by deed entered on the Court Rolls within six months from its execution[4]. Notice of the assignment of an equitable interest should, as a matter of precaution, at once be given to the trustee; or the latter may seriously prejudice the assignee by dealing with the assignor[5], or with a subsequent purchaser[6], as though they were entitled.

With regard to the way in which equitable interests may be alienated, it is important again to notice that, while the model of legal limitations is closely followed in most respects, the impossibility of the failure of equitable interests *in futuro* owing to the abeyance of the seisin, has induced the Courts to apply the Rule against Perpetuities to equitable contingent remainders, as well as to equitable executory interests[7].

[1] These doubts were set at rest by the 1 Ric. III. (1483) c. 1.
[2] 29 Car. II. (1677) c. 3. §§ 7-9. [3] 3 & 4 Will. IV. c. 74. § 47.
[4] ib. §§ 50-4. *Honywood* v. *Forster* (1861) 30 Beav. 1.
[5] *Re Lord Southampton's Estate; Banfather's Claim* (1880) 16 Ch. D. 178.
[6] *Dearle* v. *Hall, Loveridge* v. *Cooper* (1828) 3 Russell, 1.
[7] *Abbiss* v. *Burney* (1881) 17 Ch. D. 211.

3. *Protection against third parties.* Herein, perhaps, lies the sharpest distinction between an equitable interest and a legal estate. The latter is true *jus in rem*, and, if it is valid, it is valid against all the world. But the former still bears upon it, in spite of all the fostering care of Equity, traces of its origin in what would, but for certain technical difficulties, have been called a contract, an arrangement which gives rise merely to *jura in personam*, and which can bind no one but parties and privies. That the equitable interest is at the present day something considerably more than a mere contractual right, is due to the gradual establishment of the doctrine that every one is bound by a trust who ought in equity to perform it. Third parties.

Of course the story starts with the trustee himself. The case against him is clear. He has accepted the land with an express or implied trust attaching to it, and he is bound by that trust at all times and in all circumstances. But what about his heir? He may have known nothing about his ancestor's promises, and entered upon the land in perfect good faith, believing himself to be beneficially entitled. It was long before the Courts would hold him bound. In 1482, Chief Justice Hussey, in solemn discussion with the Chancellor in the Exchequer Chamber, said that the point had been decided in the negative thirty years before[1]. The same rule was observed in 1499, this time with a reporter's *quaere*[2]. At last, in 1522, the rule was reversed, just on the eve of the passing of the Statute of Uses[3]. Curiously enough, the much stronger The trustee. The trustee's heir

[1] Y. B. 22 Edw. IV. P. pl. 18, fo. 6.

[2] Y. B. 15 Hen. VII. Mich. pl. 1, fo. 13.

[3] Y. B. 14 Hen. VIII. Mich. pl. 5, fo. 8. Of course, the point is now of small practical importance, owing to the fact that the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 30, makes all trust and mortgage estates descend to the personal representative. And this principle was extended to *all* estates (with the exception of copyholds) by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), § 1. A curious question might have arisen on the Conveyancing Act. Suppose *A*, a trustee, agreed to sell the trust land to *B*, concealing the trust. *B* was a *bona fide* purchaser for value. Before the transaction was completed, *A* died intestate. *B* took a conveyance from his heir; of course he got no title. But if he had demanded

Purchaser from the trustee. With notice.

case of the purchaser with notice of the trust was won at an earlier date. In 1465, a purchaser who bought land subject to a use of which he had notice was held bound to perform the use[1]. These three points were established before the passing of the Statute, and have been transferred to the new law of trusts. One other point was soon afterwards established, for we find it recognized by Coke as unquestionable in his report of *Chudleigh's* Case[2]. This was, that any person who took from the trustee by *voluntary* conveyance was bound by the trust, even though he had no notice of its existence. The doctrine was clearly recognized in the great case of *Mansell* v. *Mansell*, which (incidentally) established the doctrine, that trustees to preserve contingent remainders who released to the tenant for life and remainderman were guilty of a breach of trust[3].

Volunteers.

Purchasers without notice.

But here the decisions stop. Against the trustee himself, against his heir, against all who take from him by way of voluntary gift, whether they have notice of the trust or not, even against purchasers for value who have notice, the Court will enforce the trust. But not as against purchasers for value of the legal estate without notice of the trust. There is no equity against them; and, having the legal estate, they will not be deprived of its advantages.

The doctrine is so well established, that it is hardly necessary to quote authority for it. But its importance is so great that it may be worth while to give a recent illustration. No better can be found than the case of *Pilcher* v. *Rawlins*[4].

Pilcher v. *Rawlins.*

In 1851, trustees of a settlement advanced money by way of mortgage to *R*, on the security of freehold estates. The mortgage deed disclosed the existence of the trust. In 1856, the surviving trustee, fraudulently colluding with *R*, executed a reconveyance of one of the estates to *R* upon the alleged

a conveyance from the administrator, that fact would have gone far to show that he had notice of the trust. Either way he would have lost.

[1] Y. B. 5 Edw. IV. Mich. pl. 16, fo. 7. [2] (1589) 1 Rep. at fo. 122 b.

[3] (1732) 2 P. Wms. 678. [4] (1872) L. R. 7 Ch. App. 259.

(but non-existent) consideration of £3,500. On the same day *R* mortgaged the same estate to *S*; but, instead of showing the mortgage of 1851 and the reconveyance, he suppressed both, and professed to mortgage by reason of his title as it existed before the mortgage of 1851. The other title deeds were handed to *S* in the usual way. *R* and the surviving trustee misappropriated the money lent by *S* on the mortgage of 1856. When the facts were discovered, the *cestuis que trustent* under the settlement claimed to have the benefit of the estate mortgaged to *S*, on the ground that they were prior in title to *S*, and quite as innocent of any fraud or neglect. Their case was very strong, because, as will have been noticed, *S* was not aware of the reconveyance by the surviving trustee to *R*, which alone enabled *R* to give a title to him (*S*). And if he had known of it, he must have been led on to discover the existence of the trust. Nevertheless, as he was a purchaser for value without notice, he was held entitled to claim the benefit of the secret reconveyance, although, if he had known of its existence, he would have been affected with notice of the trust. That is the great reason why it is always so dangerous to invest money in an equitable interest. If by any course of events the legal estate gets into the hands of a purchaser for valuable consideration, who was personally unaware of the existence of the interest, he will not be bound by it.

Who is a purchaser without notice?

It is, therefore, highly important that the privileged position of 'purchaser for valuable consideration without notice' should be strictly defined; and the Courts have devoted much care to the subject. With regard to the first part of the definition, little difficulty has been experienced. A 'purchaser' is one who takes otherwise than by descent[1], and who is not merely a creditor enforcing a general claim against the trustee[2]. 'Valuable consideration' is anything of pecuniary value given or suffered by the purchaser; and the mere inadequacy of the

[1] Co. Litt. 18 a.

[2] *Brace* v. *Duchess of Marlborough* (1728) 2 P. Wms. 491.

value, though it may lead to suspicion of notice, is not in itself an objection [1]. Further, in the case of express notice, no serious difficulty can occur. If the party seeking to upset the purchase can prove, or induce the Court or a jury to believe, that the purchaser had actual notice (no matter from whom) of the existence of the trust, the purchaser will be bound by it [2]. The difficulty comes in with regard to the question of *constructive* notice. For it will not do for an intending purchaser merely to shut his eyes and his ears, and then to plead ignorance of everything which was not actually told him. The Courts have long held a purchaser bound by notice of everything which he would have discovered if he had acted in a reasonable and ordinary way, taking all proper precautions.

Express notice.

Constructive notice.

Rules of application.

The question then really resolves itself into this—what steps would a prudent purchaser, acting in perfect good faith, take to satisfy himself of the goodness of his vendor's title? And to this question no absolute answer can be given; for much must depend upon the circumstances of each case. But the following may be taken as examples of the duties incumbent upon a purchaser, who desires to be able to set up the plea of purchase for valuable consideration without notice.

Examine title.

(i) *He must investigate the title for the proper period*—i. e. in normal cases, for forty years [3]. If he does not, he will be affected with notice of everything which he would have discovered if he had done so. And it makes no difference that he has bound himself by his contract of purchase to accept a shorter title [4]. That was his own fault.

[1] *Basset* v. *Nosworthy* (1673) Ca. temp. Finch, 102. Of course the consideration must be actually paid, not merely agreed or secured to be paid. *Hardingham* v. *Nicholls* (1745) 3 Atk. 304.

Even though the party claiming the equity have neglected to avail himself of express statutory protection—e.g. registration of title (*Trinidad Asphalte Company* v. *Coryat*, 1896, A. C. 587). The same rule would probably be held to apply to owners of registered interests in English land under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), §§ 49, 98, & 102.

[2] Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), § 1.

[3] *Re Cox and Neve's Contract*, 1891, 2 Ch. 109.

(ii) *He must actually get the legal estate.* The protection to the purchaser being founded on strict law, it is necessary that he should qualify for it by putting himself in a legal position. If he himself have only an equitable interest, there will usually be no ground to prefer him to the owner of an earlier equitable interest. And, even if he has obtained the title deeds, he will be compelled to give them up, at any rate to a claimant who has a legal title[1]. Moreover, if he do not obtain the legal estate in the first instance, he cannot protect himself by acquiring it after receiving notice of the trust[2]. Procure legal estate.

(iii) *He must inspect the land.* There can be little doubt that the purchaser of an estate in land will be affected with notice of everything that an inspection of the premises would have enabled him to discover. Thus, in *Hervey* v. *Smith*[3], decided in the year 1856, a purchaser was held bound by an equitable smoke easement, on the ground that an inspection of the house would have discovered the existence of a greater number of chimney-pots than flues to serve them, and so put him upon inquiry. And he will certainly be held to have notice of the claims of any one who is in actual possession, unless he makes all proper inquiries[4]. Inspect the land.

(iv) *He must get the title deeds, or at least a satisfactory explanation of their absence.* Although deeds are not themselves title, but only evidence of title, possession of them affords so many opportunities of fraud, that the legal owner who allows himself to be deprived of them has only himself to thank if they are made the means of raising an equitable interest against him. Thus, *A* deposited title deeds with his bankers to secure an advance, and died, having devised the property to his widow. The widow married again, and, on her second marriage, the property was conveyed by way of marriage Obtain title deeds.

[1] *Cooper* v. *Vesey* (1882) 20 Ch. D. 611.

[2] *Heath* v. *Crealock* (1874) L. R. 10 Ch. App. 22.

[3] 22 Beav. 299.

[4] *Barnhart* v. *Greenshields* (1853) 9 Moore, P. C. at pp. 32–5 (Lord Kingsdown). But the notice does not extend to the claims of persons other than the occupants, even though the occupants claim under them. *ib.*

settlement to a trustee, who, however, did not make any inquiry about the title deeds. The lady and her husband, suppressing the existence of the settlement, created a further equitable charge on the property in favour of the bankers. On the lady's death, the trustee of the settlement discovered the facts; and, being unquestionably a purchaser for value of the legal estate, claimed priority over the bankers, who were merely equitable incumbrancers. But he was held to be affected with notice, on the ground that, had he made due inquiries about the deeds, he would have discovered the existence of the bankers' claim [1]. The case is interesting as deciding two other important points, viz. (*a*) that the claim of the trustee's *cestui que trust*, though the latter was not guilty of negligence, was no better than that of the trustee, (*b*) that the knowledge of the marriage did not render it incumbent on the bankers to inquire as to the existence of a settlement. This latter point was previously subject to some doubt; and, even in *Lloyd's Banking Co.* v. *Jones* [2], Mr. Justice Pearson admitted that 'it would no doubt have been more prudent to have made the inquiry.'

Notice to agents.

There was formerly another kind of constructive notice which was often the subject of great hardship. Although a purchaser might not have himself received any notice, actual or constructive, of an equitable interest, yet, if such notice had come to any person for whose acts he was responsible, he would have been affected thereby. But now, by virtue of the Conveyancing Act, 1882 [3], a purchaser is not prejudicially affected with notice of any fact by reason of the knowledge or presumed knowledge of any other person, unless that knowledge arises in the course of the same transaction, and either actually comes to the purchaser's counsel, solicitor, or other agent *as such*, or would have come to the solicitor or other agent, as such, if he had made due inquiries.

General rule of notice.

If then the purchaser, acting with prudence and honesty,

[1] *Lloyd's Banking Co.* v. *Jones* (1885) 29 Ch. D. 221.
[2] At p. 221.
[3] 45 & 46 Vict. c. 39. § 3.

do not, either by himself or others, receive notice, actual or constructive, under the rules above stated, of any equity affecting his legal estate, he will not be held liable to such claims; if he be so affected with notice at the time of paying his consideration, he will be liable. To this rule there are two important exceptions. Exceptions.

(i) *A purchaser from a 'bona fide' purchaser for value without notice is safe, even though he himself had notice of the equitable interest.* This exception, which is clearly established, is necessary to give proper effect to the general rule[1]. If an innocent purchaser could not confer a good title on any one who had notice of the trust, the *cestuis que trustent* might, by advertising their claims, render the property unsaleable in his hands. But it does not apply where the original trustee is himself the sub-purchaser[2]. Sub-purchasers.

(ii) *A 'bona fide' purchaser of lands subject to a trust in favour of a charity is not protected against the claim of the charity if, as a fact, his vendor was aware of its existence.* This exception, one of the numerous points established by Equity in favour of charities, seems to rest on certain old decisions on the Act of 1601 [3], reported by a writer of the seventeenth century [4]; but it is adopted by modern authors of repute [5]. Charity lands.

Such is, in outline, the distinction between legal and equitable interests. To go further into details would be beyond the scope of this book. But the student may be advised, in all questions of perplexity, to hold fast by the central principle, that legal estates and equitable interests confer different rights because, although they have been assimilated in many respects, they are in their nature essentially distinct. A legal estate is, as its name implies, a *status* or position created and recognized by the law as the result of certain True distinction between legal and equitable interests.

[1] *Harrison* v. *Forth* (1695) Pre. Cha. 51, frequently followed.
[2] *Bovey* v. *Smith* (1682) 1 Vern. 60.
[3] 43 Eliz. c. 4. It is contrary to the express words of § 6.
[4] Duke, *Law of Charitable Uses*, pp. 65, 68, 94; Serjeant Moore's *Expositions*, p. 173.
[5] e.g. Lewin, *Trusts* (8th ed.), p. 859.

dealings with land. It is an objective institution, standing alone, and, to a large extent, independent of the wishes or views of individuals. A use or trust is, still, as Coke said[1], 'not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land.' In other words, it is a *contract*, by which the owner of land binds himself, expressly or by implication, to deal with the land for the benefit of a certain person or persons. And though, by reason of the favour of courts, it has acquired many valuable qualities which an ordinary contract does not bear; though by reason of its connexion with land it has acquired many of the qualities of estates in land; yet it is, in truth, but a contract still. And by reason of this fact it still falls far short of the full power of a legal estate in many respects, one of the most important being that, like all contracts, it can affect only parties and privies.

[1] Co. Litt. 272 b.

CHAPTER IX.

INCORPOREAL HEREDITAMENTS. 3. SERVITUDES.

THE word 'servitude,' though not admitted as a term of art by English Law, is imperatively needed, as a comprehensive expression, to cover those limited interests in land, legal and equitable, which are not and never can be estates, because they do not and never will confer possession upon the persons in whom they are vested. For this latter reason they are classed among Incorporeal Hereditaments. To English Law they are technically known as either 'easements' or 'profits'— easements, when they confer no right to abstract any physical attributes from the land, profits, when they do confer such a right. Thus, to take the commonest examples, a right of way is an easement; because it confers merely the legal power to pass across a given piece of land without taking anything perceptible from it. A right of pasturage is a profit, because it confers the legal power to abstract the herbage. Somewhat inconsistently, perhaps, the right to abstract water from a well or channel is usually treated as an easement, although it involves the taking of physical matter. On the other hand, the right of watercourse, i.e. either to have a stream flow uninterruptedly over one's land from the land of *A*, or, conversely, the right to discharge water from one's own land on to the land of *B*, is a true easement, where it is not one of the rights of proprietorship. The distinction between easements and profits is of practical

Easements.

Profits.

importance in many ways; but, before alluding further to the distinction, we may note those points in which all servitudes are alike.

Jura in rem. (i) *All servitudes are 'jura in rem.'* That is to say, they can be enforced, if legal, against any one who violates them, whether he were party to their creation or not, and whether he knew of their existence or not; if equitable, against any one but a purchaser for value without notice[1]. They cannot be the subject of an action of trespass, as there can be no possession of an easement. And, under the old law, they could not even be created by way of use, for the same reason[2].

Use of a servitude. But the Conveyancing Act, 1881, in a section which is certainly not free from errors of terminology, provides that a 'conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement &c. . . , shall operate to vest in possession in that person that easement &c. . for the estate or interest expressed to be limited to him[3].' And the action of Case, now superseded as a distinct form of action, enabled the person in whom the servitude was vested to defend its infringement against disturbers. If a right over land merely operates as between the parties to its creation, it is not a servitude, but a mere licence which, as between the parties to it, may be irrevocable[4], but cannot confer rights against third parties. The distinction between the two classes of rights is well illustrated by a comparison of the circumstances in the two cases of *Hill* v. *Tupper* and *Fitzgerald* v. *Firbank*.

Hill v. *Tupper.* In *Hill* v. *Tupper*[5], the plaintiff claimed the exclusive right, under a grant from the Basingstoke Canal Company, to put pleasure boats for hire on the Basingstoke Canal near Aldershot.

[1] *Hervey* v. *Smith* (1856) 22 Beav. 299.

[2] *Beaudely* v. *Brook* (1607) Cro. Jac. 189. The application of this doctrine to the subject of rents is rendered impossible by the express words of the Statute of Uses (27 Hen. VIII. (1535) c. 10), § 5.

[3] 44 & 45 Vict. c. 41. § 62.

[4] *Liggins* v. *Inge* (1831) 5 Moo. & P. 712.

[5] (1863) 2 H. & C. 121.

The defendant, the landlord of an inn on the banks of the canal, kept pleasure boats which the jury considered were let on hire. They accordingly found a verdict for the plaintiff; but the Court in Banc set aside the verdict, on the ground that the defendant had injured no right of the plaintiff. Baron Martin said: 'The grant is perfectly valid as between the plaintiff and the Canal Company; but, in order to support this action, the plaintiff must establish that such an estate or interest vested in him, that the act of the defendant amounted to an eviction[1].'

Fitzgerald v. *Firbank*.

In *Fitzgerald* v. *Firbank*[2], the plaintiff was a trustee of the True Waltonian Society, and, in that capacity, had obtained a grant from Lord Ebury of the exclusive right of fishing in a part of the river Colne for a period of 15 years, at a rent. The defendant, a contractor, shot gravel into the river, and disturbed the fishery. The plaintiff recovered damages. Rigby, L. J., said: 'A grant by deed creates an incorporeal hereditament where the subject is of such a nature that the law allows an incorporeal hereditament to be granted[3].' This last qualification leads us directly to the second feature of servitudes.

Of known character.

(ii) *Servitudes are stereotyped in character, and cannot be varied at the pleasure of the parties.* Servitudes are looked upon with suspicion by the law, as tending to fetter the enjoyment of property. The list of recognized servitudes is small, and may be said to comprise only rights of pasturage, turf- and wood-cutting, mining, way and watercourse, fishing, lights, support to buildings, presentation to ecclesiastical benefices, franchises, sporting rights, rents[4] and annuities, tithes, seignories, and a few others. Offices and dignities are incorporeal hereditaments, but they are not necessarily connected with land, and form no part, therefore, of land law.

[1] At p. 128. [2] 1897, 2 Ch. 96. [3] At p. 103.

[4] i. e. rents not incident to a reversion. Rents so incident are not considered as 'profits,' but as part of an estate in *futuro* which will one day become a corporeal hereditament.

Any attempt to create a servitude of a kind unfamiliar to the law will be ineffectual; though, as between the parties to the attempt, a perfectly good *jus in personam* may be created. As Pollock, C. B., said, in the case of *Hill* v. *Tupper* [1], 'a new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property.' And, although in the recent case of *Simpson* v. *the Mayor of Godmanchester* [2], the Court went to the extreme verge of the rule, it is conceived that the doctrine still holds good.

Effect of the Doctrine.

But its application appears to lead to the common form of error known as 'arguing in a circle.' A right created by *A* in respect of his land is not a *jus in rem*, because it is not recognized by the law as a servitude; and it is not a servitude, because it is not a *jus in rem*. The truth seems to be, that the law looks first to see whether the right is of a character which would bring it within a recognized class of servitudes; and then, if it be so, whether it has been created in such a way as to pass an incorporeal hereditament.

Jura in alieno solo.

(iii) *All servitudes are 'jura in alieno solo.'* English Law does not, as the Roman did, recognize servitudes over movables. This rule is probably due to the different views taken of possession by the two systems. Most servitudes over movables involve what the English law would call possession. The usufruct of a jewel would be treated by English Law as possession of the jewel, a true *jus in rem*, which for centuries has been protected by the actions of trespass and trover. The Romans could not call the right of the usufructuary 'possession,' because to them possession was the attitude of the man who claimed to be owner, which the usufructuary did not. And so they gave him a special action of usufruct, where the English Law gave him trespass and trover. But a servitude over land never gives possession, and so the English Law was obliged to treat it as a special kind of *jus in rem*.

Must be a servient tenement.

Moreover, servitudes are rights over *another's* land. Rights

[1] (1863) 2 H. & C. at p. 127. [2] 1896, 1 Ch. 218; 1897, A. C. 696.

which are exercised over one's own land are rights of property or possession, or, as they are sometimes (but untruly) called, 'natural rights.' About these something will be said at the close of the chapter; for they have given rise to much confusion. Here it is only necessary to point out that the phrase '*another's* land' used in the statement of the rule, merely means land of which another person is in possession by rightful and substantial title against the claimant of the servitude. It is a very common thing for a landlord granting a lease to reserve to himself a right of way or sporting over the demised premises. And such right will clearly be a servitude. But if the tenancy were merely a tenancy at will, the landlord's right of way would probably be considered as one of the so-called 'natural rights'; inasmuch as he could claim possession of the land at any time[1]. The technical definition of the land over which a servitude is exercisable is 'the servient tenement.'

Created by act of the parties.

(iv) *All servitudes arise by grant or reservation, express or implied.* It is still the law, that a legal servitude can only be expressly created by a grant, or by reservation in a deed. 'Incorporeal hereditaments lie in grant.' And even the acquisition by necessity, prescription, or custom was, until quite lately, strictly ruled by the fiction that these titles proceeded upon the presumption of a lost grant[2]. Of late the rigidity of the doctrine has been somewhat relaxed, as we shall see when we come to deal with title by prescription and custom[3]. But it is still useful as a means of distinguishing between true servitudes and so-called 'natural rights.' The attempted creation of a servitude by mere writing or word of mouth creates an equitable right only[4], or it will,

[1] Best, C. J., in *Holmes* v. *Goring* (1824) 2 Bing. at p. 83.

[2] Thus, a right of way by necessity was deemed to be extinguished when the necessity for it no longer existed, on the ground that the fictitious grant would have laid down such a condition. *Holmes* v. *Goring*, at p. 84.

[3] Post, cap. xiv. It is difficult to see how an 'appendant' servitude (post, p. 157) can ever have depended (even in theory) on a grant.

[4] *Hervey* v. *Smith* (1856) 22 Beav. 299.

if the right intended is not of the character of a servitude, create only a licence, which will become irrevocable when the person in whose favour it was created has incurred outlay on the faith of it[1].

Positive or negative.

(v) *The duty of the occupant of a tenement subject to a servitude is usually only to forbear; the right of the person in whom a servitude is vested may be either positive or negative.* It is very rarely that the law demands of a man positive performance of a duty *in rem*. But, in the case of rents and franchises, it may be said to be the duty of the servient occupier to pay the rent or to bring corn to the franchise mill. It may be questioned, however, whether the right to performance of these acts is not in itself a *jus in personam*, confined to specific persons; although the *jus in rem*, to prevent disturbance by outsiders, is clear[2]. On the other hand, the person in whom a servitude is vested may claim to do some positive act, e.g. shoot rabbits or crop grass, as in the case of profits, or merely to insist on the forbearance of the servient occupier, as in the case of rights of way and light[3].

Interests in servitudes.

(vi) *No estates can, strictly speaking, be limited in servitudes; but analogous interests will be recognized.* In spite of certain loose expressions of Acts of Parliament and text-book writers, no *estate* can exist in a right which does not carry possession; neither can such a right be 'held' of any one. But the close connection of servitudes with estates has rendered it convenient to treat expressions which would create estates, if used in connection with corporeal hereditaments, as having

[1] *Liggins* v. *Inge* (1831) 5 Moo. & P. 712.

[2] The point seems to be analogous to that raised by the decisions in *Lumley* v. *Gye* (1853) 2 E. & B. 216, and *Bowen* v. *Hall* (1881) 6 Q. B. D. 333. The employer's right against his servant is *jus in personam*; his right to insist that no one shall disturb that relationship is *jus in rem*.

[3] It is sometimes loosely said, that the right of an occupier having a light easement is to build his own premises as high as he likes. That is of course wrong. He may build his premises as high as he likes by virtue of his proprietary or possessory right; his easement entitles him to forbid the occupier of the servient tenement to darken his buildings when erected.

analogous results when applied to servitudes. Thus, a grant or reservation of an easement 'to *A*,' simply, will create an easement which will continue during the life of *A* only, unless the context show a contrary intention. If an easement is granted to a tenant for years 'his heirs and assigns,' it is a matter of construction whether it will continue in him if he purchase the fee[1]. Similarly, although many of the incidents affecting legal estates, such as wardship[2], reliefs, aids, marriages, &c., could hardly, by the nature of things, attach to servitudes, yet it is the opinion of Coke that such servitudes as rents and annuities are subject to dower and curtesy[3]. By the common law, servitudes did not escheat on failure of heirs or for the felony of the persons in whom they were vested, but became extinct for the benefit of the land[4]. The Intestate's Estates Act, 1884[5], however, makes the same provision with regard to the escheat of all incorporeal hereditaments which we have previously noticed with regard to equitable interests[6].

Destruction of servitudes.

(vii) *Servitudes can be destroyed, not only by express release, but by abandonment, non-user, and merger.* The same considerations which, in times past, have led the Courts to lay down the rule that new kinds of servitudes cannot be created, have led them to regard with favour the extinction of servitudes in favour of the servient tenements. Thus, if the person in whom a servitude is absolutely vested release it to any one having an interest in the servient tenement, the servitude will be extinguished for ever. In strictness, a deed is necessary for such a release; but a written or verbal release would, at any rate if acted upon, have the effect of relieving the servient tenement in equity from the burden of the servitude[7]. Moreover, any positive abandonment of a servitude

[1] *Rymer* v. *McIlroy*, 1897, 1 Ch. 528.

[2] Apparently the king was entitled to the wardship of servitudes vested in the infant heir of his tenant in chief. (Co. Litt. 78 a.)

[3] Co. Litt. 29 b, 30 b, 32 a.

[4] Coke, 3 Inst. 21.

[5] 47 & 48 Vict. c. 71. § 4.

[6] Ante, p. 135.

[7] Clearly assumed in *Waterlow* v. *Bacon* (1866) L. R. 2 Eq. 514.

works an extinction[1]; and mere non-user will have the same effect, if, in all the circumstances of the case, it appears to amount to evidence of abandonment (but not otherwise[2]). And this quite independently of any counter-acquisition of a servitude by the owner of the servient tenement[3]. If the right to the servitude and the land itself become vested in the same person in the same right[4], for interests equally perdurable, the servitude will be extinguished by operation of law[5]. But if the interests be not equally perdurable, the servitude is only suspended during their unity, and will revive again at their separation. The last point was laid down in the case of *Rex* v. *The Inhabitants of Hermitage*[6], the circumstances of which are so interesting, that they will bear repetition.

Rex v. *Hermitage.*

One Micoe complained of a nocturnal riot and destruction of hedges, pales, stiles, and gates, appurtenant to an enclosure of three hundred acres, which he claimed in the waste of the vill of Hermitage in Dorsetshire. Pursuant to cap. 49 of the Statute of Westminster II[7]—a most suggestive chapter from the point of view of economic history—the six neighbouring vills were distrained to make good the damage, which was assessed by Inquisition at £360. Five of the vills pleaded that the damage had been done by the prosecutor's own servants; but the vill of Hermitage boldly asserted that the waste was part of the manor of Fordington in Dorsetshire, which manor itself was part of the Duchy of Cornwall, and that all the tenants of holdings in Hermitage had a right to pasture on the waste, which right had been interfered with by the prosecutor. In fact, the inhabitants of Hermitage justified the destruction of the hedges, as the abatement of a nuisance. To this plea the prosecutor demurred.

[1] *Moore* v. *Rawson* (1824) 3 B. & C. 332.
[2] *Seaman* v. *Vawdrey* (1810) 16 Ves. Jr. 390.
[3] Littledale, J., in *Moore* v. *Rawson* (1824) 3 B. & C. at p. 341.
[4] *Ecclesiastical Commrs.* v. *Kino* (1880) 14 Ch. D. 213.
[5] Co. Litt. 313 b; *Lord Dynevor* v. *Tennant* (1888) L. R. 13 App. Ca. 279.
[6] (1692) Carth. 239.
[7] 13 Edw. I. (1285) c. 49.

It appeared that the tenements in respect of which the pasturage rights were claimed had been part of the property of the Abbey of Sarum, which had been vested absolutely in the Crown by Act of Parliament on the dissolution of the monasteries[1]. At that time there was no heir apparent to the throne, and, consequently, the Duchy of Cornwall was vested also in the Crown, but only for a fee determinable on the birth of a male heir. which event was realized by the birth of the future Edward VI in the year 1538. The prosecutor's demurrer argued, in effect, that the unity of interest in the Crown established in 1535 extinguished the rights of pasturage. But the Court of King's Bench, led by Hale, unanimously resolved that this unity worked only a suspension, which was terminated by the separation of the Duchy on the birth of Edward VI. The prosecutor succeeded on a purely technical objection to the plea; but one is glad to read that the damages were reduced to £20, each party paying his own costs, which, as it cost the prosecutor £65 to bring the jury up from Dorsetshire, could not have left him much profit on the transaction.

(viii) *Servitudes are classed, by reason of their connection with or independence of any tenement other than the servient tenement, as 'appendant,' 'appurtenant,' and 'in gross.'* A servitude has always, as we have seen[2], a tenement over which it is exercised, known as the 'servient tenement.' But its enjoyment may be annexed to the possession of another tenement, for the benefit of the person occupying that tenement. In this case, the tenement, as an adjunct to which the servitude is enjoyed, is called the 'dominant tenement'; and the servitude itself is said to be either 'appendant' or 'appurtenant'. It may very well be doubted whether the distinction between appendancy and appurtenancy is not the creation of comparatively modern times. But it is now understood to be that the servitude claimed by appendancy is claimable 'of common

Servient tenement.

Dominant tenement.

Servitudes appendant and appurtenant.

[1] 27 Hen. VIII. (1535) c. 28.
[2] Ante, p. 153.

right,' or, perhaps we should say, 'by law'; while a servitude claimed by appurtenancy is alleged on the basis of a grant, actual or fictitious[1]. The legal differences between the two, though historically unfounded, are, or at least one of them is, of some importance. An appendant servitude, being really claimable by law, can only be claimed in respect of circumstances to which the law annexes it. Thus, common of pasture appendant can only be claimed in respect of ancient arable land, and for beasts of husbandry, e. g. horses, oxen, and sheep. Whereas common of pasture appurtenant can be claimed in respect of any land and for any beasts, provided that the evidence warrants the presumption of a lost grant in those terms[2]. On the other hand, if one of several persons having common appurtenant purchase an estate in the servient tenement, his servitude will be extinguished, or at least suspended; while, in the case of common appendant, such a purchase would only result in a proportionate reduction of his claim to pasturage over the rest[3]. Moreover, a claim to a servitude appurtenant by prescription or long user can much more readily be defeated than a similar claim to a servitude appendant, and this notwithstanding the Prescription Act. But both kinds of servitudes are alike in this, that they must 'agree in quality and nature to the thing whereunto they are appendant or appurtenant.' Thus, pasturage cannot be claimed in respect of a house, nor rights of turf-cutting in respect of land. And this rule has been held in modern times to go further, and to decide that a servitude cannot be claimed as appurtenant to an estate in land, unless it is to be exercised in connection with that land[4]. Servitudes appendant and appurtenant also resemble one another in this, that they will, independently of recent legislation, pass by a conveyance of

[1] *Anon.* of 1534 (Y. B. 26 Hen. VIII. T. pl. 15, fo. 4) adopted by Mr. Justice Stirling in *Baring* v. *Abingdon*, 1892, 2 Ch. at p. 378.

[2] Co. Litt. 122 a. *Tyrringham's* Case (1584) 4 Rep. 36 b.

[3] ib. fo. 38.

[4] *Ackroyd* v. *Smith* (1850) 10 C. B. 164 (easements); *Bailey* v. *Stephens* (1862) 12 C. B. (N. S.) 91 (profits).

the dominant tenement[1], without express mention, and even without the use of general words[2].

Servitudes 'in gross' are servitudes which are vested in individuals or corporations, not as occupiers of any particular tenements, but simply in their personal right. In other words, they are servitudes which have no 'dominant' tenements. That such servitudes may exist as profits, is unquestionable; the right established by the decision in *Fitzgerald* v. *Firbank*, before alluded to[3], was that of a several fishery, or a fishery in gross. But there has been laid down a theory that there cannot be an easement in gross. The theory was emphatically stated by Lord Cairns in *Rangeley* v. *the Midland Railway Co.*, decided in the year 1868[4]. Although, perhaps, the point was hardly necessary to the decision of the case before him, Lord Cairns said emphatically: 'there can be no easement properly so called unless there be both a servient and a dominant tenement. . . . There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross[5].' And his lordship repudiated the application of the term 'easement' to such rights as the public right of user of a highway[6]. The view has received the support of many authorities, and has even been implicitly adopted by the Legislature[7]. But, inasmuch as *jura in alieno solo* may clearly exist in limited bodies of persons who do not claim by virtue of any dominant tenement[8], it seems to be somewhat dangerous to adopt a theory which may induce courts of justice, in their endeavour to protect existing usages, to confer privileges upon indefinite bodies rather than upon

Servitudes in gross.

No easement in gross.

[1] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 6.

[2] Co. Litt. 121 b. But the statute is useful to cover 'reputed' easements.

[3] 1897, 2 Ch. 96. (Ante, p. 151.)

[4] L. R. 3 Ch. App. 306.

[5] At pp. 310-1.

[6] This was the theory of Mr. Justice Heath in *Dovaston* v. *Payne* (1795) 2 H. Bl. 527.

[7] County Courts Act, 1888 (51 & 52 Vict. c. 43), § 60.

[8] *Fitch* v. *Rawling* (1795) 2 H. Bl. 393; *Hall* v. *Nottingham* (1875) L. R. 1 Exch. D. 1.

specific individuals. It is highly probable that, but for the existence of this technical rule, the mooring rights established in *A.-G.* v. *Wright*[1] would have been restricted to a definite class of persons.

A servitude in gross, if lawfully established, may be transferred by deed or will[2]; but this capacity would probably not be held to apply to easements established by custom.

A few words may now be said in explanation of the specific servitudes enumerated at the beginning of the chapter.

Commons. (i) '*Commons*,' so called because they are usually enjoyed in connection with the exercise of similar rights by the members of a group, especially by the tenants of a manor in respect of the manorial wastes. The orthodox theory is, that such rights are a creation, express or implied, of the lord of the manor, in whom the soil of the waste is, by legal doctrine, vested. This theory, certainly in embryo as long ago as the Statute of Merton[3], is far too firmly settled to be shaken by anything short of an Act of Parliament. Historical evidence is not likely to be accepted in disproof of a doctrine which has been quoted with approval by a long line of judges and legal writers. But the theory of common appendant is, as we have seen[4], really inconsistent with the principle that all common rights were the voluntary creation of manorial lords. And the more modern doctrine of 'presuming a lawful origin' for common rights which have been long exercised[5], to say nothing of the numerous Commons Preservation Acts[6], has placed substantial restrictions upon the practical enforcement of the doctrine of the Statute of Merton. The various kinds of 'commons' appear to be:—

(*a*) *Pasturage*, the most frequent and valuable of all, which frequently includes mast and acorns (the so-called 'pannage'

[1] 1897, 2 Q. B. 318.

[2] Co. Litt. 49 a; Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), § 3; *Earl of Huntingdon* v. *Mountjoy* (1582) Co. Litt. 165 a.

[3] 20 Hen. III. (1235) c. 4. [4] Ante, p. 158.

[5] *Warrick* v. *Queen's College, Oxford* (1871) L. R. 6 Ch. App. at p. 723.

[6] 29 & 30 Vict. c. 122 (1866); 39 & 40 Vict. c. 56 (1876); 41 & 42 Vict. c. 56 (1878), &c.

or 'pawnage'), and may even be exercised by the tenants of adjoining manors indiscriminately in the wastes of each ('common because of vicinage[1]').

(*b*) *Turbary*, or right of cutting turf for fuel; if claimed as appendant or appurtenant, only in respect of houses.

(*c*) *Piscary*, or right of fishing.

(*d*) *Estovers*, or right of cutting timber and furze, digging coals and gravel, and even mining for precious minerals.

All these rights may exist in gross, and need not necessarily be exercised in common with other persons. They are then said to be 'several,' or exclusive. Thus, the right of mining recognized in *Earl of Huntingdon* v. *Mountjoy*[2], was a several right of mining; and the fishery in *Fitzgerald* v. *Firbank*[3] a several fishery. There may also be a several pasture[4].

(ii) *Seignories*. A seignory is the possibility of reverter which remains in a feoffor after a sub-infeudation in fee. Such a right, which must necessarily be older in its creation than 1290[5], may be appendant to a manor or honour, or may exist in gross, in which case it is called a 'lordship.' It is essentially a 'profit,' as it may involve claims to heriots, rents, escheats, fines, &c. Seignories.

(iii) *Franchises*, or exceptional privileges, not arising by reason of tenure, but exercisable in respect of a definite area of land, are said to require a royal grant for their creation[6]. This theory may probably be traced to the great *Quo Warranto* inquiry of 1278; but in practice it is disregarded, proof of long continued user being admitted as evidence of a grant[7]. Frequent examples of franchises or liberties are tolls, markets, ferries, free or exclusive fishery in a navigable river. The latter was strictly forbidden by *Magna Carta*, which extended the prohibition backwards to acquisitions under Richard I[8]. So every claim to such a privilege must date from the reign of Henry II at least. Franchises.

[1] Blackstone, *Comm.* (4th ed.), II. 33.
[2] (1582) Moore, 174.
[3] 1897, 2 Ch. 96.
[4] Co. Litt. 122 a.
[5] 18 Edw. I. c. 1.
[6] Blackstone, *Comm.* (4th ed.), II. 37.
[7] ib.
[8] 9 Hen. III. (1225) cc. 16, 23.

Advowsons.

(iv) *Advowsons*, or the perpetual right of presentation to vacant ecclesiastical benefices, may be, according to Blackstone[1], either appendant or in gross. The right to a single, or any number of presentations, may be severed from the advowson; but this right is considered as personalty, not as realty. The exercise of the right of presentation, as well as the alienation of the advowson, is subject to the rules against simony, which will be alluded to in a later chapter[2].

Tithes.

(v) *Tithes*, likewise of an ecclesiastical character, are claimable by the rector (who may be a layman) or vicar of a parish in right of his church, from the annual produce of the lands in the parish ('predial tithes'), of the stock thereupon ('mixed tithes'), and of the labour of the parishioners ('personal tithes')[3]. The latter have long ceased to be paid in England, except in respect of the profits of mills[4]. Tithes, whatever be their legal origin, have long been payable by virtue of common law; and therefore, any one who seeks to set up an exemption in respect of them, must prove the exemption by some regular title, e. g. a *modus* or composition, redemption under the provisions of the Tithe Redemption Acts, or prescription *de non decimando*, by reason that the lands were formerly abbey-lands discharged of tithe, or the like[5]. Tithes have now, by virtue of various statutes[6], been commuted into a rent-charge varying with the price of corn; but tithe-owners long retained, by virtue of statute[7], that summary power of distress and seizure which was the fruitful source of so much bad feeling when tithes were paid in kind. By the Tithe Act, 1891[8], however, tithe rent-charge is made payable (notwithstanding any contract to the contrary) by the owner, and not by the occupier of the land; and the

Tithe Act, 1891.

[1] *Comm.* (4th ed.) II. 22. If an advowson were granted to *A*, lord of the manor of Dale, his heirs and assigns, lords of the said manor, to go along therewith, would not this make the advowson 'appurtenant'?

[2] Post, cap. xvii. [3] Blackstone, *Comm.* (4th ed.), II. 24.

[4] Phillimore, *Ecclesiastical Law* (2nd ed.), II. 1188.

[5] Blackstone, II. 28-32.

[6] 6 & 7 Will. IV. (1836) c. 71, and various amendments.

[7] Ib. § 81. [8] 54 & 55 Vict. c. 8.

power of distress can, therefore, only be exercised when the owner is in occupation. In any other case, the claimant must obtain the appointment of a receiver from the County Court, and pay himself out of the rents. Neither by the new Act nor by the common law is there any personal liability on any one to pay tithes; they are simply a charge on the land. The earlier Tithe Commutation Acts left it open to the tithe-owner to demand an 'extraordinary' rent-charge on hop-grounds, orchards, fruit-plantations, and market-gardens; but this 'extraordinary' charge has been abolished for the future, and its redemption provided for in cases where it existed already [1].

'Extraordinary' tithes.

(vi) *Rents and annuities* [2]. These are issues out of land created or existing in favour of persons not being entitled to the reversion expectant on the estate out of which they were created. At the common law, they were rents *seck*, i.e. dry or barren, which could not be recovered by distress, unless the grant contained an express power of distress, in which case the issue was known as a 'rent charge.' Where there was no remedy against the land, a Writ of Annuity lay against the grantor; but not where there was a real remedy, unless he had expressly covenanted to pay [3]. Now, however, by the Conveyancing Act, 1881 [4], any person who is entitled to receive an annual sum (other than rent incident to a reversion) out of the income of land, may (subject to prior incumbrances) enforce its payment, if it be in arrear for twenty-one days, by entry and distress, if for forty days, by taking possession of the land and receiving the income, or by creating a term of years in a trustee which can be sold or mortgaged to produce the required amount. In certain cases, owners whose lands are

Rents and annuities.

Statutory powers of enforcement.

[1] Extraordinary Tithes Acts, 1890 and 1897 (53 & 54 Vict. c. 54; 60 & 61 Vict. c. 23).

[2] An annuity is defined by Coke (Co. Litt. 144 b), as 'a yearly payment of a certain sum of money . . . charging the person of the grantor only.' But annuities can be charged on land.

[3] Co. Litt. 144 b.

[4] 44 & 45 Vict. c. 41. § 44. But the section is made subject to the provisions of the instrument creating the charge.

subject to perpetual rent-charges can compel the persons in whom the charges are vested to allow their redemption [1]. In order to affect purchasers for value and creditors, rent-charges and annuities (other than those granted by marriage settlement) must be registered at the offices of the Supreme Court [2]; when they have been satisfied, an entry of satisfaction may be similarly recorded [3].

Sporting rights.

(vii) *Sporting rights* require no special treatment. The extent of the powers conferred by them depends upon the terms of their creation.

Ways, watercourses, lights.

(viii) *Ways*, (ix) *Watercourses*, (x) *Lights* are all easements of great importance, the nature of which is explained by their names. To go into details would lead us beyond the scope of a general work.

Rights of support.

(xi) *Rights of support.* here seems to be no doubt that the right of *A* to have his buildings supported by the land or buildings of *B* is recognized by English Law, and can be acquired by express grant or by prescription. The only difficulty arising on the subject comes from the fact that the Courts have sometimes denied that the right to support of buildings from land is an easement [4]. This theory has been applied in the laudable endeavour to prevent the Statute of Limitations running against a surface owner whose buildings have been undermined by quarryings which, though lawful in themselves, are carried on at the peril of damage to the surface. But, with all respect, it seems to be unnecessary and dangerous. Whatever be the case with regard to the lateral support of land from land, the landowner who parts with his subsoil, or, (which amounts to the same thing) acquires the surface only, can assert a right to support of his buildings by the subsoil only by virtue of a reservation or grant, express or implied. And it would seem that this right would not be violated, and, therefore, the Statute of Limitations would not

[1] 44 & 45 Vict. (1881) c. 41. § 45. [2] 18 & 19 Vict. (1855) c. 15. § 12.
[3] 23 & 24 Vict. c. 115. § 2 (1860).
[4] e. g. Lord Wensleydale, in *Backhouse* v. *Bonomi* (1861) 9 H. L. C. at p. 513.

begin to run, until subsidence were actually caused. And it must now, since the decision of the House of Lords in *Angus* v. *Dalton*[1], be taken as law, that a right to the support of buildings by land is a true easement, claimable either by express grant or by prescription, and that the existence of the buildings is a sufficient notice to found the claim of enjoyment. A claim to the support of buildings by buildings is, of course, an easement. The man who rests his wall on his neighbour's is, *prima facie*, and independently of Building Acts, guilty of trespass. He can justify his act only by permission or by long toleration, which implies permission. But this is precisely the case with all easements[2].

'Natural rights.'

Finally, it is necessary to advert to the class of rights which are often, as we have seen, confused with servitudes, but which are, in truth, radically distinct from them. These are the so-called 'natural rights,' such as to use, for ordinary domestic and agricultural purposes, water flowing over the claimant's land[3], to dig in one's own soil, and so on. These rights are, in simple truth, merely fractions of that complex bundle of rights which we call *ownership*, and which are recognized by the law as existing independently of special grant or contract, express or implied. Once let it be established that the law does guarantee an occupier or owner the exercise of such rights, and it stands to reason that an action will lie, at least *prima facie*, against any one who disturbs them. And such right does not become a servitude, merely because its exercise hinders another man in doing something that he would like to do on his own land[4]. These so-called 'natural rights' differ from true servitudes in four points:—

No special title.

(i) *They presuppose neither grant nor custom nor prescription*[5].

[1] *Angus* v. *Dalton* (1878) 4 Q. B. D. at p. 169; (1881) L. R. 6 App. Ca. 740.

[2] The exercise of a right of servitude may, in fact, be defined as a justifiable trespass.

[3] *Miner* v. *Gilmour* (1858) 12 Moo. P. C. at p. 156.

[4] I may dig in my land in such a way as to prevent my neighbour building his house as near his own boundary as he wishes. But my right is an exercise of a right of property, not of a right of servitude over my neighbour's land.

[5] *Sury* v. *Pigot* (1626) Poph. 166.

Consequently they cannot be defeated by proof of the absence of any special title. In other words, the *onus* is upon any one who infringes them to justify himself; and this he can only do by showing special title.

No servient tenements.

(ii) *They have no servient tenement*[1]. For the exercise of the so-called 'natural right' is, *ex hypothesi*, perfectly consistent with the 'natural rights' which the law recognizes as belonging to all other owners or occupiers of land.

Not transferable.

(iii) *They (probably) cannot be severed from the general rights of ownership of which they form part.* Thus, in *Stockport Waterworks Co.* v. *Potter*[2], it was held that a riparian proprietor who affected to convey, *together with land which did not abut on the stream*, a right to use a stream, created no servitude which could be made the subject of an action by the assignees as against third persons. It is a little difficult, however, to reconcile this decision with the judgement of the same court in the later case of *Nuttall* v. *Bracewell*[3], more especially as Baron Bramwell, who dissented from the majority of the court in the former case, adhered to his views in the latter. But the decisions may possibly be reconciled.

Not extinguishable.

(iv) *They cannot be lost by non-user, abandonment, or merger.* It would, of course, be absurd to hold that a right which arose by virtue of ownership was extinguished by being vested in the same person as the owner[4]; or that it had to be continually exercised to prevent extinguishment. But, with regard to the latter point, it must be carefully noted that it may be destroyed, at least for the time, by the acquisition of a hostile easement by a stranger. Thus, it is a 'natural right' of ownership to build on one's land; but if one's neighbour acquire a right to a light easement, it may become impossible to exercise it.

[1] *Sampson* v. *Hoddinott* (1857) 1 C. B. (N. S.) at p. 611.

[2] (1864) 3 H. & C. 300.

[3] (1866) L. R. 2 Exch. 1. The ground of the decision in this case was, that the diversion was effected in such a way as to make the assignee also a riparian proprietor.

[4] *Wood* v. *Waud* (1849) 3 Exch. at p. 775; *Sury* v. *Pigot* (1626) Poph. 166.

CHAPTER X.

INTERESTS IN COMMUNITY AND ON CONDITION.

To a limited extent the law allows of interests in land being qualified by the existence of co-ownership, or by the contingency of conditions.

Co-ownership, now comparatively rare, and only recognized as the result of specific dealings with land, was probably at one time the prevalent mode of ownership. It must carefully be distinguished from two cases which, at first sight, it appears to resemble. Several persons may be interested in the same piece of land; but yet they may not be co-owners. *A* may be tenant for years, *B* remainderman for life, *C* remainderman in fee, *D* may have a right of way over the land; but *A*, *B*, *C*, and *D* are not co-owners, because their interests are perfectly distinct, and, in a manner, hostile to one another. Co-owners are persons in whom a single interest is vested.

Co-ownership.

Distinguished from

(*a*) Successive ownership.

Again, the interests in land owned by a *corporation*, though the latter consist of many individuals, are not interests in co-ownership; because the corporation is regarded as a single person by the law. No individual corporator is now (whatever he may have been at one time) entitled to an individual and separable interest in the lands of the corporation. The developement of the law of corporations is one of the chief reasons of the decay of common ownership. Communities have been turned into corporations, and corporations are treated by the law as individuals—'fictitious persons.'

(*b*) Corporate ownership.

Co-ownership can now only exist in the four following cases, of which the last is, perhaps, doubtful:—

Parcenary. (i) *Parcenary*, which occurs when, by virtue of the common law or special custom, an estate in fee or tail *descends* upon two or more persons as co-heirs of a deceased person. When we come to deal with the law of Inheritance, we shall see that the case of parcenary among males is impossible in lands which descend by virtue of common law principles; but in gavelkind lands parceners may well be males or females. So long as the chain of descent is uninterrupted, the parcenary continues. Thus, if *A* purchase lands in fee and die intestate, leaving two daughters *B* and *C*, the latter will be parceners; and if, without alienating her share, *C* die leaving three daughters, these three as to one moiety of the land will be parceners with each other, and, as to the whole, parceners with *B*[1]. By the strict wording of the Land Transfer Act, 1897, succession by parcenary of the legal estate is impossible in the case of an owner who dies after December 31, 1897[2]; but it seems likely that the terms of the Act[3] will be construed to vest the estate by conveyance or registration in the heirs for the same interests which they would have had before the Act.

Land Transfer Act, 1897

Features of parcenary. The position of parceners is somewhat illogical. Though they are said to have but a single freehold[4], so that they must join and be joined in all actions concerning the land, yet there is no right of survivorship amongst them, and, notwithstanding the Inheritance Act[5], their shares will descend *per stirpes* to their own issue exclusively, though parceners can never be purchasers[6]. Moreover, they can convey to one another by feoffment (and now, therefore, by grant or conveyance also[7]); but it would seem that a release of one to the other will also convey the undivided share[8]. There must be unity of title, interest, and possession amongst

Unities.

[1] Co. Litt. 164 a. [2] 60 & 61 Vict. c. 65. § 1. [3] ib. § 2.
[4] Co. Litt. 164 a. [5] 3 & 4 Will. IV. (1833) c. 106. § 2.
[6] *Cooper* v. *France* (1850) 19 L. J. (N. S.) Ch. 313; Ruling Cases, ix. 301.
[7] Co. Litt. 164 a; 8 & 9 Vict. (1845) c. 106. § 2. [8] Co. Litt. 9 b.

parceners; but not necessarily unity of time, for a posthumous daughter may inherit, and, after the death of one parcener, his or her heirs may be, as was said, parceners with their uncle or aunt. There may be parcenary of servitudes, such as advowsons and rents; but not of things in their nature indivisible, as homage, fealty, and estovers, or the division of which would increase the burden of the servient tenement, such as rights of piscary and common *sans nombre*[1]. In the case of homage and fealty, if the tenant rendered these to one parcener, he was excused as to the others[2]; in the case of estovers and commons, the eldest exercises the rights and has to make allowance for them in the division of the profits. If there be no other inheritance comprised in the descent, the parceners exercise the rights in turn[3]. Likewise of services due from the inheritance which are indivisible; rendering by one parcener excuses the others[4]. Parcenary of servitudes; and liabilities.

If one parcener aliene the lands to a stranger for his or her whole estate therein, this works a severance as to the share aliened, and the alienee is tenant in common with the other parcener or parceners[5]. But if a parcener in fee simple make a lease for years or life of his or her share, this will not work a severance[6]. Every parcener had by the common law the Writ *de partitione facienda* to compel a division by the sheriff and a jury[7]; the quaint devices for partition described by Littleton refer to voluntary partitions only[8]. At an early date, however, the Court of Chancery offered the alternative remedy of a commission to a Master to report upon a division. This jurisdiction, one of the earliest examples of Chancery procedure on record, dates from the first half of the fourteenth century[9]; but there seems to be some doubt whether it was not at first confined to the direct tenants of the Crown[10]. Alienation.

[1] Co. Litt. 164 b. [2] ib. 67 b. [3] ib. 165 a.
[4] ib. 67 b. [5] ib. 167 b.
[6] ib. 174 b. If the lease were for life it prevented the Writ of Partition being brought (ib. 167 a).
[7] Abolished by 3 & 4 Will. IV. (1833) c. 27. § 36. [8] Co. Litt. 167 a.
[9] *Rex* v. *Hill* (1347) Y. B. 21 Edw. III. M. pl. 14, fo. 31.
[10] F. N. B. 138 (C).

Moreover, a commission in Chancery was not final; but could be set aside by a *sci. fa.*[1]. And both forms of procedure were imperfect, in that they did not admit of sale and division of the proceeds; though, apparently, there was power to allot a rent or other servitude for 'owelty', or equality, of partition[2]. By recent legislation[3], the facilities for obtaining a partition have been greatly increased, and will be discussed in a later chapter. A curious instance of partition by law occurs where female parceners have heritable issue, and die, leaving their husbands tenants by the curtesy. In this case, the husbands, at least, will not be parceners[4].

Although parceners could not bring the ordinary actions of trespass or ejectment against each other, owing to their unity of possession, the special writs of *Nuper Obiit* and *de Rationabili Parte* lay against those who deprived their co-parceners of their due shares[5]. And, though these writs have been abolished, a similar action presumably lies[6].

Joint-tenancy.

(ii) *Joint-tenancy* occurs where there has been a limitation of the same estate, by deed, Will, or parol, to two or more persons without words of severance. Thus, a limitation 'to *A* and *B* and their heirs,' or 'to *A* and *B* for the term of twenty-one years,' makes *A* and *B* joint-tenants, in fee or for years respectively. A limitation 'to *A* and *B* and the heirs of their bodies' gives *A* and *B* an estate in special tail, if *A* and *B* are persons who might lawfully marry; if they are not, it gives them an estate for life as joint-tenants, with remainder to them as tenants in common in tail general[7]. In such a case, each would be able, with the consent of the other, to bar his estate tail completely, subject only to the chance of a survivorship life estate in the other in the whole

[1] *Rex* v. *Hill*, above, per Skipworth, *arguendo*. F. N. B. 139 (H).
[2] Co. Litt. 169.
[3] Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17).
[4] Co. Litt. 167 b.
[5] *Nuper obiit* only lay where the ancestor died actually seised, F. N. B. 19 (G).
[6] 3 & 4 Will. IV. (1833) c. 27. § 36.
[7] Co. Litt. 182a.

land. If they could not agree, each might create a base fee in his share, subject, likewise, to the survivor's life estate.

Joint-tenants are said to have four unities, viz. (*a*) time, (*b*) title, (*c*) interest, and (*d*) possession. Unity of title there certainly must be, i. e. the estate of both must arise under the same limitation; but, by the operation of the Statute of Uses, the old necessity that the titles of all the joint-tenants should commence at the same time is avoided. Thus, a conveyance 'to *A* and *B* to the use of the first and all other sons of *C* born or to be born' within the lifetime of the settlor, and their heirs, gives to the future-born sons of *C* an estate in joint-tenancy with those existing at the date of the settlement[1]. And unity of interest there must be, in the sense that the joint-tenancy can only last as long as the estates of both joint-tenants; but a limitation 'to *A* and *B* and the heirs of *B*,' will be perfectly good, *A* and *B* being joint-tenants for life, with remainder to *B* in fee. Unity of possession there is, if the estate is in possession; but a remainder may be well limited to two or more jointly. Unities.

There seems to be no reason why servitudes should not be enjoyed in joint-tenancy, as well as in parcenary; subject, as in that case, to the exceptions for indivisibility and burden of the servient tenement[2]. Certainly there might be joint ownership of a rent[3].

A conveyance by one joint-tenant of his whole interest to a stranger, works a severance of the joint-tenancy; but a conveyance for a less interest probably does not. Thus, in a very recent case, it was held that neither the marriage of a female joint-tenant, nor a subsequent lease for years by the husband and the other joint-tenant, reserving rent jointly, caused a severance of the joint-tenancy[4]. But Lord Coke thought that a subdemise granted by *one* joint-tenant of a term of years would effect a severance; 'for a term for a small Severance.

[1] Co. Litt. 188 a.
[2] Ante, p. 169.
[3] *Bracebridge* v. *Cook* (1572) Plowden, at p. 419.
[4] *Palmer* v. *Rich*, 1897, 1 Ch. 134; and *Re Wilks*, 1891, 3 Ch. 59.

number of years is as high an interest as for many more years [1].' On the other hand, a joint-tenancy cannot be severed by devise, for *jus accrescendi ultimae voluntati praefertur*, nor by mere charges or incumbrances, for *jus accrescendi praefertur oneribus*. And incumbrances created by a joint-tenant do not bind the survivor [2]. Joint-tenants convey to one another by Release, and no words of inheritance are required to pass a fee [3]. To strangers, they convey in the ordinary manner, with the usual words of limitation.

For practical purposes, the three chief points of interest concerning joint tenure are (*a*) partition, (*b*) survivorship, (*c*) necessity for joinder in actions.

Partition. (*a*) Joint-tenants had no right to compulsory partition at the common law, because their estate was created by act of the parties. But they could, of course, if of full age and capacity, effect a voluntary partition [4]. And two statutes, of the years 1539 and 1540 respectively [5], conferred upon joint-tenants, whether in fee or for less estate, powers of compulsory partition similar to those enjoyed by parceners at the common law. Joint-tenants also take the benefit of the recent Partition Acts [6].

Survivorship. (*b*) Perhaps the most singular feature of joint-tenancy is the right by survivorship conferred by law. If one of two joint-tenants die, leaving the other him surviving, the survivor becomes solely entitled to the estate, and this whether it were in fee, or for life, or for years [7]. The right of survivorship defeats all but actual legal dispositions of his interest made by the deceased tenant by act *inter vivos*. Thus, it defeats all attempts at devise [8], all mere contracts affecting the land (even though these were sufficient to raise equitable

[1] Co. Litt. 192 a; *Syms'* Case (1584) Cro. Eliz. 33. [2] Co. Litt. 184 b.
[3] ib. 273 b. [4] ib. 187 a.
[5] 31 Hen. VIII. c. 1; 32 Hen. VIII. c. 32.
[6] 31 & 32 Vict. (1868) c. 40; 39 & 40 Vict. (1876) c. 17. As to these see post, cap. xxi.
[7] Co. Litt. 181 a.
[8] ib. 185 a. When Littleton wrote, lands were only devisable by special custom.

interests[1]), all incumbrances not operating by way of limitation of a legal estate[2]; but not judgement debts upon which execution has been actually levied during the debtor's lifetime[3], nor a lease for years, even though it were not to take effect in possession till the death of the lessor[4]. The husband and wife of a deceased joint-tenant have no claim to Curtesy or dower in respect of the joint estate[5].

(*c*) Upon the third point, the necessity of joining in actions by and against joint-tenants, there seems to be some diversity of opinion. It is stated by Coke as a general principle, that 'joint-tenants must jointly implead and jointly be impleaded by others[6].' But, in *Sheehan* v. *G. E. Ry. Co.*[7], Malins, V. C., gave it as his opinion, that one of several joint owners might sue a stranger for wrongfully cutting down timber on the land; and in *Broadbent* v. *Ledward*[8], Lord Denman allowed one joint owner of a chattel to sue in detinue. On the other hand, it was admitted in *Broadbent* v. *Ledward*, and in the recent case of *Roberts* v. *Holland*[9], that one of several joint covenantees cannot sue alone on the covenant. The rights of joint-tenants against one another seem to be the same as in the case of tenants in common[10]. Joinder in actions. Torts. Contracts.

Joint-tenancy is a very convenient form of ownership in some cases, e. g. those of trustees and partners, where it is undesirable that the representatives of deceased owners should interfere with the management of the land. But it is a form of ownership not favoured by the law, on account of

[1] Co. Litt. 185 a. [2] ib. 184 b, 185 a. [3] ib. 184 b. [4] ib. 186 a, b.

[5] ib. 31 b. It is curious that Littleton nowhere seems to state positively that a widow could not be endowed out of her husband's joint-tenancy. But the principle is plain, for no issue of hers could possibly have inherited. And the whole practice of limiting to 'uses to bar dower' turned on the assumption. The assignment of dower by one of two joint-tenants, alluded to by Coke (ib. 35 a), is an assignment of dower to the widow of a former owner.

[6] ib. 180 b, 195 b. [7] (1880) 16 Ch. D. at p. 63.

[8] (1839) 11 Ad. & E. 209.

[9] 1893, 1 Q. B. at p. 667; following *Foley* v. *Addenbrooke* (1843) 4 Q. B. 197. But if his co-covenantees refuse to join as plaintiffs, they can be made defendants. (*Cullen* v. *Knowles*, 1898, 2 Q. B. 380.)

[10] Post, p. 175.

the uncertainty of survivorship. And particularly, in the case of estates conveyed to partners in trade as joint-tenants, although on the death of one the estate will legally survive to the other partners, the latter will be deemed trustees in respect of the deceased partner's share for his personal representatives, *as personalty* [1]. The same rule applies when the purchase money of a joint purchase is, on the face of the transaction, advanced in unequal shares [2], and in all cases of joint mortgages [3].

Tenancy in common.

(iii) *Tenancy in common* occurs where there has been a limitation to two or more to hold expressly as tenants in common, or in such a manner as to imply a severance of interests, and also where a previously existing parcenary or joint-tenancy has been severed without actual partition. Thus, a limitation 'to *A* and *B* and their heirs in equal moieties,' or 'as to one half to the use of *A* and his heirs and as to the other to the use of *B* and his heirs' will make *A* and *B* tenants in common in fee simple [4]. So also, if *A*, *B*, and *C* are parceners or joint-tenants, and *C* aliene his share to *X*, a stranger, *X* will be tenant in common of one-third with *A* and *B*, who, as to the other two-thirds, will be parceners or joint-tenants [5]. A tenant in common may also (subject to the Land Transfer Act, 1897) be in by descent; as if one grantee in common die intestate as to his share, and his heir succeeds. For there is no survivorship among tenants in common; and each of them has a several estate [6]. Tenancy in common may also be created without words of severance; if a conveyance be made to two corporations and their successors, or to a corporation and an individual, the donees are tenants in common [7].

[1] *Lake* v. *Craddock* (1732) 3 P. Wms. 158. Partnership Act, 1890 (53 & 54 Vict. c. 39), § 20.

[2] *Lake* v. *Gibson* (1729) 1 Eq. Ca. Ab. at p. 291 (290).

[3] *Petty* v. *Styward* (1631) Cha. Rep. 31, frequently followed.

[4] Co. Litt. 190 b.

[5] Co. Litt. 189 a, 195 a. If *C* had released to *A*, the latter would have been tenant in common with *B* as to one third part, and joint-tenant with him of the remaining two-thirds (Co. Litt. 193 a).

[6] ib. 189 a.

[7] ib. 189 b, 190 a.

But the rule does not hold in conveyances of chattels real[1]. And, generally speaking, whenever two persons become tenants of undivided shares by different titles, they become tenants in common, not joint-tenants[2].

There may be tenancy in common of servitudes, subject to the restrictions previously mentioned[3].

Unity.

Among tenants in common the only necessary unity is that of possession, which prevents them bringing the action of trespass against one another. If one tenant in common be wholly excluded from the subject-matter of the tenancy, he may bring an action in the nature of ejectment against the ejector; but for taking an excessive share of the profits no legal action lies against a tenant in common[4]. And it would appear that, in strictness, the rule which allows ejectment applies only where the subject-matter is divisible; where it is indivisible, as in the case of a live animal or a servitude, there is no remedy for ouster but retaking[5]. If one tenant in common makes the other his bailiff to collect the profits of the whole estate, an action for an account will lie against the latter[6]; but a recent decision shows that the mere fact that one tenant in common collects the whole profits does not constitute him the other's bailiff[7]. It seems, however, that an action of Waste lies by one tenant in common against another[8]; and, for actual destruction of the subject-matter, trespass may also be brought[9].

Actions against strangers.

In respect of actions against strangers, each tenant in common has a complete right to sue in his own name, at any rate in tort[10]. A doubt arises in the case of contract, owing to the stress laid by Littleton on the distinction between real and personal actions[11]. But the latest decision on the subject seems to lean in favour of the view that each

[1] Co. Litt. 190 a. [2] ib. 188 b. [3] ib. 199 a.
[4] ib. 199 b. [5] ib. 199 b.
[6] ib. 172 a, 200 b, and 4 Anne (1705) c. 16. (4 & 5 Anne, c. 3) § 27.
[7] *Kennedy* v. *de Trafford*, 1897, A. C. 180.
[8] Co. Litt. 200 b. [9] ib. 200 a, b.
[10] *Roberts* v. *Holland*, 1893, 1 Q. B. 665. [11] Co. Litt. 198 a.

has a right to a separate action[1], except, perhaps, when it is to recover an indivisible chattel[2].

Tenants in common have the same rights of partition as joint-tenants[3].

Tenancy by entireties.

(iv) *Tenancy by Entireties.* It is probable that this curious form of ownership cannot now exist, except as the result of limitations made before January 1, 1883, to persons still living. Before that date, a limitation to a man and his wife made them, not joint-tenants, but tenants by entireties, on account of the unity of person, unless the limitation expressed that the wife was to take a separate interest[4]. And a limitation to *A* and *B* (husband and wife) and a stranger, made *A* and *B* tenants by entireties as to one moiety, and joint-tenants with the stranger of the whole[5]. In tenancy by entireties, neither tenant could defeat the survivorship right of the other, by alienation or severance[6]; and it was even held that the treason of the husband did not bar his wife's right by survivorship[7]. But a limitation to *A* and *B*, who afterwards married, did not operate to create a tenancy by entireties upon the marriage[8].

Effect of Married Women's Property Act, 1882.

As regards conveyances made since the coming into operation of the Married Women's Property Act, 1882[9], it seems to be clear that, *as between husband and wife,* a limitation in terms which would have created a tenancy by entireties before the Act will now make them joint-tenants, the wife's interest being for her separate use[10]. But, regard being had to the decision in *Jupp* v. *Buckwell*[11], it must still be said that a limitation to *A* and *B* (husband and wife) and *X*, a stranger, gives only one moiety between *A* and *B*, *X* taking the other moiety.

[1] *Roberts* v. *Holland*, 1893, 1 Q. B. 665.
Co. Litt. 196 b, 197 a, b.
Warrington v. *Warrington* (1842) 2 Hare, 54.
ib. 326 a; *Freestone* v. *Parratt* (1794) 5 T. R. 652.
ib. 187 b.
45 & 46 Vict. c. 75. §§ 1, 5.
Thornley v. *Thornley*, 1893, 2 Ch. 229.
[3] Ante, p. 172.
[5] Co. Litt. 187 a.
[7] Co. Litt. 187 a.
[11] (1888) 39 Ch. D. 148.

It is very doubtful if there ever could be a tenancy by entireties of a term of years; inasmuch as a husband had, by the common law, a right to alienate his wife's chattels real, and, if he did not, they survived to her, or passed to her personal representatives[1].

Conditional interests.

We now come to deal with Interests upon Condition, a somewhat difficult subject, and not of great practical importance, owing to the leaning of the law against forfeitures. A condition may be defined as a contingency, upon the happening of which an estate or interest will vest or devest. It is to be distinguished from the mere effluxion of time which puts an end to an interest, and which is called a limitation. Thus, a gift 'to *A* for life, remainder to *B* in tail'; here *A*'s estate expires naturally on *A*'s death, which must certainly happen, and is only a contingency in the sense that it is uncertain when it will happen. This is a true limitation. A gift 'to *A* until he shall be appointed to a benefice worth £500 a year, and then to *B* and his heirs,' would create a condition, save for the fact that the law, in its dislike of conditions, treats it as a limitation. But a gift 'to *A* for life, but if he shall obtain a benefice worth £500 a year, then to *B* and his heirs,' though conveying precisely the same meaning to a layman, would create a condition, of which *B* could, however, take no advantage, for the reason presently to be stated.

Conditions in law.

Conditions are divided into conditions in law, and conditions in deed. The former arise by operation of law to vest or devest an interest, and need not be further discussed, as they have already been dealt with in treating of the incidents of tenure and estates[2]. Thus, it is a condition in law that if a tenant in fee simple die intestate and without heirs his estate shall cease, and the land go by escheat to the lord. But this is, evidently, a mere legal incident of estates in fee. Conditions in deed, on the other hand, are conditions imposed

[1] *Bracebridge* v. *Cook* (1572) Plowd. 416.

[2] Limitations are also (most unfortunately for perspicuity) classed Littleton as conditions in law (Co. Litt. 234 b).

by the will of the parties, either express, or to be gathered from circumstances.

Conditions in deed.

The first thing to consider then, in respect to a condition in deed, is, as to what expressions or circumstances will create it. For it may very well be, that an instrument will lay an obligation upon the taker of an interest, without imposing a condition the breach of which will work a devesting. This is the ordinary case of a covenant which, though it imposes a personal obligation on the covenantor, does not, in the absence of special circumstances, render him liable to forfeiture of his interest for the breach. A condition is only created, when it is the clear intention of the parties that on the happening of it an interest *in rem* shall vest or devest. And this is to be gathered from the whole tenour of the instrument [1]. But there are certain words which of themselves amount to a condition, e. g. the words 'upon condition,' or 'on condition [2],' or a clause commencing with the words 'provided always [3].' And a clause or expression can always be turned into a condition by a subsequent reservation, in the same instrument, of a right of re-entry upon breach of the stipulation contained in the clause [4]. This is the common course in leases for years, and its effect is usually to convert all the lessee's covenants into conditions. Occasionally also, the expression of the *cause* of an assurance will create a condition, as in the case of the grant of an annuity 'for' or 'by reason of' a certain object. Here, upon failure of the object, the annuity will cease [5]. And, in a lease for years, such words as 'so that the lessee shall not,' and the like, amount to a condition [6]. But greater strictness is required in the case of actual estates of freehold [7], although one very curious example of a condition arising from the expression of 'cause' is given by Coke. He says, that if a woman gives lands to a man and his heirs *causa matrimonii praelocuti*, if she marry the man (or he refuse to

[1] *Thomas' and Ward's* Case (1590) 1 Leon. 245. There is the usual more liberal construction for the language of Wills (Co. Litt. 236 b).
[2] Co. Litt. 203 a. [3] ib. 203 b. [4] ib. [5] ib. 204 a.
[6] *Thomas' and Ward's* Case (1590) 1 Leon. 245. [7] Co. Litt. 204 a.

marry her), she shall have the lands again. But the converse will not hold; 'for it stands not with the modesty of women in this kind, to ask advice of learned counsel, as the man may and ought[1].'

Conditions thus made may be divided into conditions subsequent, and conditions precedent. Conditions subsequent are those which, on their happening, cause an interest to devest. One of the most common of these, when Littleton wrote, was the ordinary mortgage condition, that, if the mortgagor (borrower) should pay to the mortgagee (lender), on a fixed day, the sum borrowed, the mortgagor might re-enter upon the land conveyed by way of security, and avoid the estate of the mortgagee[2]. Conditions precedent are those which, on their happening, entitle a person to claim an interest. In the case last put, the payment of the money was a condition precedent as regards the interest of the mortgagor, though subsequent as regards that of the mortgagee. So it is evident that the same event may operate both as a condition precedent and a condition subsequent. This fact notwithstanding, there is an important difference between the two. For if a condition precedent be void for impossibility or illegality, the estate to which it is precedent will never vest; but if a condition subsequent be void, the estate to which it is attached will be absolute and indefeasible[3]. As to conditions that are illegal, besides all those which contemplate the commission of actual crime, any unqualified condition against alienation, or enjoying the profits of the estate, is illegal[4]. But qualified covenants to the same effect are valid. Thus, a gift 'to *A* and his heirs but, if *A* should aliene, then to *B* and his heirs' would give *A* a fee simple absolute; but a similar gift with restriction against alienation to a particular person named, or even with restriction against alienation to any but the members of a class, would entitle the donor to re-enter

Conditions subsequent and precedent.

[1] Co. Litt. 204 a. [2] ib. 205 a. [3] ib. 206 a.

[4] ib. 206 b. A similar objection attaches to conditions in restraint of marriage in gifts of pure personalty; but the rule does not apply to land. *Bellairs* v. *Bellairs* (1874) L. R. 18 Eq. at p. 513.

upon breach of the condition [1]. Somewhat inconsistently, the Courts have allowed the object aimed at by these restrictive conditions to be secured by the process of limiting the lands *until* the event shall happen; and it is not necessary even to add an express gift over [2]. Moreover, a condition for cesser of an annuity (and, probably, of any other servitude) on alienation is valid [3]. A common law condition to the effect that the donee's estate shall terminate at the option of the donor is void; but a man who conveys to uses may reserve the power of revoking the uses [4].

Rules affecting conditions in deed.

Certain highly technical rules affecting conditions in deed must be specially mentioned.

1. Must be evidenced by deed or record.

(i) *It is a rule of the common law that a condition, if imposed by the parties upon an estate of freehold, must be made by deed or record, and that any person seeking to take advantage of it must produce the deed or show the record* [5]. The rule is the more remarkable, that, at the time when it was established, the most valuable freehold estates could be conveyed by feoffment without deed. But, apparently, the law did not permit the ostensible character of the livery to be qualified by anything less than deed or record. The rule, however, did not apply to conditions in leases for years, which could be made without feoffment [6]. And if the person taking advantage of the condition were skilful enough to place himself in the position of a defendant, he might, on a plea of 'not guilty' or other general plea, induce the jury to find the existence of the condition as a matter of fact [7]; although he could not himself plead the condition, because he had no deed to show for it [8]. A dowress is excused from the rule, because she is not entitled

[1] Co. Litt. 223 a. *Re Macleay* (1875) L. R. 20 Eq. 186.

[2] *Rochford* v. *Hackman* (1852) 9 Hare, 475. A man can even limit lands to himself until alienation (*West* v. *Williams*, 1898, 1 Ch. 488), but not until bankruptcy (*Merry* v. *Pownall*, 1898, 1 Ch. 306).

[3] *Dommett* v. *Bedford* (1796) 6 T. R. 684.

[4] Co. Litt. 237 a. The power must, however, be exercised, if at all, before the use is executed (*Hoe's* Case (1600) 5 Rep. 89 b).

[5] Co. Litt. 225 a.

[6] ib. 225 a.

[7] ib. 226 a.

[8] ib. 228 b.

to the deeds of the estate; but a lord by escheat, and a husband by curtesy, are not exempt[1].

(ii) *No one can take advantage of a condition but the donor of the estate, his heirs or assignees.* By the common law, the rule was much stricter; and only the donor and his heirs could take advantage of a condition. But, upon the dissolution of the monasteries, the donees of the Church lands found themselves unable to enforce the conditions imposed on their tenants by their predecessors, notwithstanding the attornment of the tenants. And so, by statute of the year 1540[2], which, though somewhat confused in its wording, has been held to apply to all assignees of reversions[3] in respect of conditions made for the benefit of the reversion, it was enacted that the benefits of conditions made by their predecessors should pass with the assignment of the reversion. Formerly, conditions were also indivisible; so that, on the severance of a reversion, by division among two or more grantees, a condition was destroyed[4]. But, by Lord St. Leonards' Act[5], where, upon a severance, the rent is legally apportioned, the assignee of each part of the reversion is entitled to the benefit of all conditions or powers of re-entry *for non-payment of rent.* And, by the Conveyancing Act, 1881, which, however, on this point only applies to leases made after December 31, 1881, *every* condition or right of re-entry contained in a lease will be apportioned on a severance of the reversion, and will not be extinguished by reason of the avoidance or cesser of the term with respect to part of the land[6]. But it must be remembered that the doctrine of the indivisibility of a condition only applied to severance by act of the parties[7]. If part of the land comprised in a lease be held in common socage tenure by the lessor and another part in gavelkind, or borough-English, and the lessor die intestate, whereby the land is

a. No one can take advantage of but the donor or his heirs.

Severance.

[1] Co. Litt. 225 b, 226 a.

[2] 32 Hen. VIII. c. 34.

[3] i. e. Reversions strictly so called, but not to fee farm rents separated from the reversion (*Flower* v. *Hartopp* (1843) 6 Beav. at p. 405).

[4] *Winter's* Case (1572) Dyer, 308 b.

[5] 22 & 23 Vict. (1859) c. 35. § 3.

[6] 44 & 45 Vict. c. 41. § 12.

[7] *Winter's* Case (1572) Dyer, at fo. 309 a.

divided between two or more heirs, each will have a right to enforce the conditions of the lease as to his share [1]. And, with regard to the whole subject of enforcement of conditions, it may be pointed out that the objection to enforcement by a stranger applies only to conditions in deed, not to conditions in law [2]. Rights of entry are now freely disposable, both by Will and by deed [3]; but, presumably, a right to take advantage of a forfeiture could not be directly reserved in favour of a stranger. And a person who claims by virtue of a condition cannot succeed if he himself or those through whom he claims have rendered the condition impossible of performance [4].

3. Entry or claim.

(iii) *The proper way in which to take advantage of a forfeiture is by entry or claim.* This was the rule of the common law [5]. When the claimant could enter peaceably, he did so, when he could not, he made a formal claim [6]. But, in some cases, the claimant had no right to enter; and then the law vested the estate in him without entry or claim. Thus, if *A* demise to *B* for five years, upon condition that upon payment of forty marks by *B* within the first two years, *B* shall have the fee, here, if livery of seisin were made to *B*, a fee simple conditional would vest in him from the date of the demise. But, upon non-fulfilment of the condition, *A* would be in as of his former estate without entry or claim, because he could not lawfully enter upon *B* till the five years were expired [7]. Similarly, as a man cannot enter upon a rent charge or other servitude issuing out of land of which he is in possession, in such a case a forfeited servitude will be extinct without entry [8]. And a condition expressing that a term of years is to be *void* on the happening of a certain event, will determine the estate without entry on the occurrence of the contingency [9]. But some conditions in law require action for their enforce-

[1] Co. Litt. 215 a.

[2] e.g. A lord by escheat, or remainderman, can enforce a forfeiture for Waste against the particular tenant (Co. Litt. 215 a, 251 a).

[3] 7 Will. IV. & 1 Vict. c. 26. (Wills Act, 1837) § 3; 8 & 9 Vict. c. 106. (Act to amend the Law of Real Property, 1845) § 6.

[4] Co. Litt. 206 b. [5] ib. 218 a. [6] ib. 253 b. [7] ib. 216 b.

[8] ib. 218 a. [9] ib. 214 b.

ment; and there is no right of entry before judgement. A conspicuous example was the right of forfeiture for Waste, conferred by the Statutes of Marlbridge and Gloucester [1].

The general effect of an entry or recovery for condition broken is to revest in the claimant his former estate, to the destruction of all interests limited after the happening of the condition, as well as of all incumbrances created upon the forfeited estate [2]. Thus, if *A* convey to *B* for life, with a condition that if *B* attempt to aliene his interest to *X* his estate shall be void, and then to *C* and his heirs, and, upon the condition broken, *A* enter for a forfeiture, this entry will destroy *C*'s remainder [3]. But executory interests are not destructible by the forfeiture of a precedent estate. And the condition itself may prescribe other remedies for its breach [4]. Effect of re-entry.

(iv) *The breach of a condition may be waived or excused.* This rule is often expressed by the maxim, that no one need take advantage of a forfeiture. Waiver is the implied abandonment of the right to enforce a forfeiture, by acceptance of rent or other acknowledgement of the title of the person in whom the defeasible interest is vested, by a person who knows of the existence of the breach [5]. A forfeiture is excused, when the person contingently entitled to enforce it gives the owner of the defeasible interest licence to commit a breach. Great practical inconvenience was caused by the old rule that a waiver or excuse of a forfeiture destroyed the condition [6]. But it has now been provided by statute that a licence [7] and a waiver [8] shall only extend to the breach to which it particularly relates. 4. Waiver.

(v) *A condition upon the happening whereof an estate is to be devested must be imposed at the time of the limitation of the estate; it cannot be imposed afterwards* [9]. The execution of 5. Defeasance must be contemporary with gift.

[1] 52 Hen. III. (1267) c. 23; 6 Edw. I. (1278) c. 5; Co. Litt. 233 b.
[2] *Flower* v. *Hartopp* (1843) 6 Beav. at p. 484.
[3] Co. Litt. 379 a.
[4] ib. 203 a.
[5] *Walrond* v. *Hawkins* (1875) L. R. 10 C. P. 342.
[6] Co. Litt. 211 b.
[7] Lord St. Leonards' Act, 22 & 23 Vict. (1859) c. 35. §§ 1, 2.
[8] 23 & 24 Vict. (1860) c. 38. § 6.
[9] Co. Litt. 236 b.

a deed of Defeasance after the limitation of the estate would, if allowed to be effectual, evidently open the door to an endless prospect of fraud. And the establishment of a condition by deed executed contemporaneously with but separately from the conveyance of the estate, though strictly lawful, is not free from the same objection [1]. But the rule does not apply to defeasances of servitudes, powers, conditions, and other 'executory inheritances [2].'

Conditions and perpetuities.

Finally, it has been suggested [3] that the Rule against Perpetuities may apply to conditions subsequent, in the sense that a condition which may cause a devesting after the expiry of the time fixed by the rule is void. But, although there have been cases in which the rule has been applied to so-called conditions, e. g. covenants for reconveyance on a contingency, which really (if they are valid at all) create an equitable interest in the covenantee, there seems to be no decision on the point as regards a true common law condition. The case of *Tyler* v. *Tyler* [4] was a case of charities, which are exceptions from the Rule against Perpetuities.

[1] *Cotterell* v. *Purchase* (1735) Ca. temp. Talbot, at p. 64.
[2] *Albany's* Case (1586) 1 Rep. 110 b; Co. Litt. 237 a.
[3] e. g. Challis, *Real Property*, 2nd ed., p. 174.
[4] 1891, 3 Ch. 252.

CHAPTER XI.

RULES OF LIMITATION.

It may be useful here to state in a summary form the general principles of the law which govern the limitation of interests in land. Some of these principles will have appeared before, in the discussion of the various interests affected; but a brief recapitulation will serve to impress them on the memory. Others, which are rules of limitation pure and simple, have not yet been discussed. The subject comes conveniently between a description of interests in land, and an account of the means whereby such interests are acquired and lost. (See Part II of this book.)

Estates.

1. An *estate*, or *corporeal hereditament*, is a collection of rights and duties sufficient to entitle its owner (in the absence of express stipulation) to possession of land or receipt of the rents and profits thereof, as against all persons. (Ante, p. 5.)

Incorporeal hereditaments.

2. An interest not amounting to an estate, or an *incorporeal hereditament*, is a collection of rights and duties in respect of land, which can be recovered specifically as against all (or almost all) persons, but which does not confer possession of the land as of right. (Ante, pp. 92, 93.)

The qualification as to recovery is rendered necessary by the rule concerning the purchaser of the legal estate out of which an equitable interest issues (ante, pp. 142–7). Some incorporeal hereditaments, e.g. reversions and remainders, will confer possession at a future date; others, e.g. equitable interests, may confer possession at the discretion of the Court; others, e.g. servitudes, never can confer possession. But all are alike in that they do not confer present possession *as of right*.

Alienation.

3. Any interest, corporeal or incorporeal, may be alienated by its owner in proper form. [*Quia Emptores* of 1290 (18 Edw. I), c. 1; Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26.) § 3; Act to Amend the Law of Real Property, 1845 (8 & 9 Vict. c. 106), § 6.]

The exceptions to this rule arise chiefly from the personal incapacity of the parties in whom interests are vested, which will be discussed in Part II. Exceptions created by Acts of Parliament in special cases merely indicate the existence of the rule.

Quantum of interests.

4. Every incorporeal hereditament is, in the eye of the law, less than any corporeal hereditament, not only in *quantum*, but in duration. Corporeal hereditaments, or estates, are themselves in a series of lengths, in which every copyhold estate is less than any socage estate, and every estate for years less than any copyhold estate.

This is a doctrine for which it is hard to find any direct authority, because courts of justice are not given to the enunciation of principles. But the student will find that it is implied in every decision upon the validity of an attempt to create an interest in land[1].

Creation of interests.

5. Any incorporeal hereditament (which can lawfully be created by a subject) may be created by the owner of any corporeal hereditament; and any smaller estate may, in the absence of express stipulation, be created by the owner of a larger one.

This rule, which is a corollary to No. 4, may appear at first sight somewhat startling. It is submitted, however, that it is the effect of the decisions. If *A*, tenant for life, create a rent-charge in favour of *B* and his heirs, this will be a good creation; but, of course, the rent-charge will cease to be payable when *A* dies. On the other hand, if *A*, tenant for life, were to convey the land to *B* and his heirs, the conveyance would merely give *B* an estate *pur auter vie*, with special occupancy to his heir. Formerly, if effected by livery of seisin, it would have worked a forfeiture.

[1] It seems to be, curiously enough, the theory that every term of years is less than every other term of years. Cf. *Grute* v. *Locroft* (1591) Cro. Eliz. 287, where a lease for seventy years by a man who had only a term of sixty, was held good.

But there are two real exceptions to this rule :—

Copyholds.

(*a*) **No copyhold estate can be granted, however great the estate of the lord, unless the custom of the manor warrants it. And no copyhold interest can be created in land not usually granted to hold by copy, except with the consent of the Board of Agriculture**[1].

Leases by copyholders.

(*b*) **A copyholder cannot, however long his estate, grant (in the absence of special custom) a lease by demise for more than one year, without his lord's licence. If he attempt to do so, he incurs a forfeiture**[2].

Reversions.

6. **When a smaller estate**[3] **is created out of a larger one, the residue of the latter left undisposed of by the operation is called 'the reversion.'** (Ante, p. 94.)

Remainders.

7. **When an interest is limited to come into possession or enjoyment upon the natural expiry of an interest or interests, previously limited by the same conveyance, it is called a 'remainder,' and the interest immediately preceding it in order of limitation is called the 'particular estate.' If the remainder *merely* await the determination of the particular estate to come into possession, it is said to be 'vested'; if it await also the happening of a collateral event, it is called 'contingent.'** (Ante, pp. 94–9.)

Vested. Contingent.

Rules for creation of remainders.

8. **The creation of remainders is subject to the following rules :—**

(*a*) **No remainder can be limited after a fee simple.** (Ante, p. 97.)

Because a fee simple, in the view of the law, exhausts the possibilities of enjoyment of the land; and, therefore, no interest can take effect after its expiry. The rule applies, not only to fees simple absolute, but also to fees simple determinable, and, probably, also to fees simple conditional[4].

[1] Copyhold Act, 1894 (57 & 58 Vict. c. 46), § 81. The section authorizes a curious violation of the rule that a fee simple cannot be created at the present day.

[2] *Jackman* v. *Hoddesdon* (1594) Cro. Eliz. 351.

[3] The rule is sometimes loosely extended to include interests other than estates. But if the owner in fee of a rent-charge grant a life estate out of it, he has not a true reversion (*Earl of Stafford* v. *Buckley* (1750) 2 Ves. Sr. at p. 177).

[4] Co. Litt. 18 a; *Earl of Stafford* v. *Buckley* (1750) 2 Ves. Sr. at p. 180.

(*b*) **A remainder of freehold must have a particular estate of freehold to support it, i.e. must be limited to take effect in possession immediately after the expiry of a vested freehold.** (Ante, pp. 95–7.)

The term 'freehold' here includes interests of the duration of freeholds in copyhold tenements[1] and incorporeal hereditaments *in esse*[2].

(*c*) **When an interest is by deed given to an unborn person, any subsequent limitation to any issue of such person is void.** (Ante, pp. 99–100.)

It will be remembered that, in a Will, such a limitation is, by virtue of the *cy-près* doctrine, held to confer upon the first donee an estate tail, descendible (if not barred) to the issue specified. (Ante, pp. 99, 100.)

From the second (*b*) of these rules for the creation of remainders is drawn an important corollary, sometimes stated as a substantive rule, thus:—'No freehold can be limited to commence *in futuro*,' i.e. after the expiry of a fixed term of years, or the happening of a contingency[3]. It will be obvious that this is the necessary result of the rule, that a remainder of freehold must have a particular estate of freehold to support it. And the same rule justifies the proposition, that there cannot be an intermittent freehold—i.e. a freehold which will exist only at intervals. Thus, a limitation 'to *A* and his heirs, tenants of the manor of Dale' will give *A* a base fee, determinable at the moment when he or his heirs cease to be tenants of Dale; and the estate will not revive, though the connection is again established[4]. But this rule does not apply to limitations by way of springing use; nor does it apply to the creation of incorporeal hereditaments *de novo*[5].

Failure of contingent remainders.

9. Contingent remainders may possibly fail by the destruction or expiry of the particular estate before they are ready to come into possession. (Ante, pp. 103–5.)

Formerly it was a general principle, that a contingent remainder failed if it was not ready to come into possession at the

[1] *Lovell* v. *Lovell* (1743) 3 Atk. 11.

[2] *Stile* v. *the Abbot of Tewkesbury* (1493) Y. B. 8 Hen. VII. Tr. pl. 1, fo. 1, especially the remarks of Vavasor, J., at fo. 3 (B).

[3] *Buckler's* Case (1597) 2 Rep. 55.

[4] *The Prince's* Case (1606) 8 Rep. at p. 16 b. The Duchy of Cornwall is such an intermittent fee; but that is limited by Act of Parliament.

[5] *Rex* v. *Kemp* (1695) 2 Salk. 465.

expiry of the immediately preceding estate. But now it cannot fail by reason of the forfeiture, surrender, or merger of the particular estate; and, if created by an instrument executed, or (in the case of a Will) republished, after August 2, 1877, it may take effect as an executory limitation, notwithstanding the previous determination or expiry of the particular estate. But a contingent remainder which is void as an executory limitation is not protected by the Act. (Ante, p. 105.) Equitable (and possibly legal) contingent remainders are also subject to the Rule against Perpetuities.

Executory interests.

10. By a limitation operating under the Statute of Uses, or by a devise, executory limitations, not affected by the rules for the creation of contingent remainders, may be created to any extent within the Rule against Perpetuities, viz. that no such limitation is good unless interests created by or under it must *necessarily* vest within a life or lives in being at the date of the limitation and twenty-one years afterwards, with a further limit for the period of gestation, where the same actually exists. (Ante, pp. 116, 117.)

A possibility of competition between the construction of a limitation as a remainder and an executory interest is provided for by the sub-rule, that a limitation which can be construed as a valid remainder must not be treated as an executory interest. (Ante, p. 119.)

Accumulations.

Any limitation (other than a provision for payment of debts, raising portions for the children of the settlor or any person taking an interest, or for the preservation of timber) which directs the accumulation of income beyond the life of the settlor *or* twenty-one years from his decease, *or* the minorities of persons living at the death of the settlor, *or* the minorities of beneficiaries, is void to the extent of such excess. Accumulations directed towards the purchase of land are still more restricted. (Ante, pp. 117, 118.)

Merger.

11. Where two interests, next to one another in order of succession, and either both legal or both equitable, become vested in the same person *in the same right*[1] the lesser of the two interests[2] is 'merged' or destroyed. But—

[1] Possibly, before the Judicature Act, there was merger at law when the two estates, though in different rights, vested in the same person by operation of law. But not now (*Radcliffe* v. *Bewes*, 1892, 1 Ch. 227).

[2] For the purposes of merger, an estate *pur auter vie* is smaller than an estate for the life of the tenant (*Snow* v. *Boycott*, 1892, 3 Ch. at p. 115).

(*a*) **An estate tail will not merge, so long as it is necessary to protect issue; and a base fee will not merge in the reversion, but enlarge** (*Wiscot's* Case (1599) 2 Rep. at p. 61; 3 & 4 Will. IV. c. 74. § 39).

(*b*) **There will be no merger where the union has been produced by fraud** (*Danby* v. *Danby* (1675) Ca. temp. Finch, 220).

This was formerly the rule only in Equity; it is now also the rule at Law (Judicature Act, 1873, § 25 [4]).

(*c*) **There will be no merger when it is the intention of the person in whom the two estates are united that there shall be none** (*Snow* v. *Boycott*, 1892, 3 Ch. 110).

The destruction of a servitude by its becoming vested in the owner of the servient tenement (ante, pp. 155-7) is not strictly a merger, but an extinguishment.

Rule in *Shelley's* Case.

12. Where an estate of freehold is limited to a person, and, by the same assurance, an estate of the same nature (legal or equitable) is limited, mediately or immediately, to his 'heirs' in fee or tail, the word 'heirs' is a word of limitation, not of purchase, i. e. the estate in fee simple or fee tail is vested in the person to whose heirs it is limited (*Shelley's* Case (1581) 1 Rep. 93).

The Rule in *Shelley's* Case is not a rule of interpretation, but a rule of law[1]; it will be applied, therefore, notwithstanding any direction to the contrary[2], and notwithstanding an apparent difference in character between the two estates, if they are really both alike[3]. In the case of a Will, the words 'issue' or 'heir' would probably be held to have the same effect as the more technical 'heirs' in a deed[4].

[1] *Van Grutten* v. *Foxwell*, 1897, A. C. 658.
[2] *Jesson* v. *Wright* (1820) 2 Bli. 1.
[3] *White and Hindle's Contract* (1877) 7 Ch. D. 201.
[4] *King* v. *Melling* (1675) 1 Ventr. 225; 2 Levinz, 58.

PART II.

THE ALIENATION OF INTERESTS IN LAND.

CHAPTER XII.

ALIENATION BY OPERATION OF LAW.

Aliena-tion.

I. INHERITANCE.

By act of the parties.

We have seen that a series of statutes has conferred upon all owners of interests in land, with trifling exceptions, the power of alienating their own interests. Other statutes, of which we have also spoken, have conferred also upon many persons, known technically as 'limited owners,' the power of alienating other people's interests. It remains to be seen, in this part of the work, how such powers are exercised. In other words, we have to understand the principles of conveyancing.

By operation of law.

But, in addition to these alienations, which are the voluntary acts of the parties who make them, every system of law, and our own among them, recognizes and enforces certain involuntary alienations. That is to say, upon the happening of certain events, the law will step in and transfer a particular interest in land from *A* to *B*, whether *A* likes it or not. For example, if *A* dies intestate, the law will vest his interest in land in a specified person or persons, quite regardless of *A*'s feelings or wishes expressed during his lifetime. Or, if *A* become indebted to *B*, and the latter take the proper steps, the law will direct its officer to hand over *A*'s land to *B*, either temporarily or permanently, in satisfaction of the debt.

Thus we obtain at once a useful classification of methods of alienation. Some are voluntary, intended deliberately by the parties to carry out their own arrangements. Others are involuntary, in the sense that they take effect independently of the wishes of the parties, or, at least, of one of them. In a sense, all alienations are 'acts of the law' and also 'acts of the parties'; for no alienation can be effectual if the law does not sanction it, and it is hardly possible to conceive a case of alienation in which some act of the parties is not required to set the law in motion. But the two classes can clearly and usefully be distinguished.

At the present day, there can be little doubt that the class of voluntary alienations is by far the most important in practice. And, therefore, it might be thought that a text-book of modern law should deal with it first. But, in fact, the discussion of voluntary alienations will ultimately lead us into matters of some difficulty, such as mortgages and settlements, which are better left to the end of an elementary book. There can, on the other hand, be no practical inconvenience in following the example set by Littleton and Blackstone, and dealing first with involuntary alienations.

Inheritance.

Among these latter the topic of Inheritance, or Descent, is usually accorded the first place, more on account of its historical interest than its present importance; for it is probable that, at the present day, the amount of property which passes by Descent in the course of any year is comparatively small. But, in the days before the Statute of Wills, the rules of Inheritance were matters of the greatest importance to every lawyer; and, even in Blackstone's time, the subject was deemed sufficiently large to occupy a whole division of the subject of Title[1].

Appearance of rules of inheritance.

The antiquities of the Law of Inheritance constitute one of

[1] *Comm.* (4th ed.), II. p. 201. The arrangement, though it may appear to have the authority of Littleton (I. § 12) and Coke (*Inst.*, I. 18 b), cannot be commended for practical convenience. A classification which places one title in one category and all the rest in the other lacks something in point of symmetry.

the most fascinating chapters in the history of legal institutions; but we do not touch on them here. It is sufficient to say that, after a period of much uncertainty, the rules of Inheritance emerged into distinctness, through a mass of tradition and decision, towards the end of the Middle Ages. As in so many other matters, Bracton gave the rules of Inheritance their canonical form, so far as military and socage tenures were concerned; and this form they retained, practically unchanged, till the passing of the Act of 1833[1]. As regards copyholds, their recognition by the common law courts came too late to permit of the extinction of local varieties in favour of a uniform system; and it is still the rule that the custom of the manor governs the descent of the copyhold tenement, save in so far as uniform rules have been expressly prescribed by Act of Parliament. In leasehold tenure, there never has been any Inheritance, properly so called; the leasehold interests of an intestate were distributed amongst his next of kin, according to the rules of the ecclesiastical courts, until the rules of Distribution were made statutory in the seventeenth century. Lands held in Frankalmoigne cannot, of course, descend.

Copyholds.

Leaseholds.

Frankalmoigne.

It will thus be seen that, to ascertain the fate of any particular interest in land, as to which its owner has died intestate, we must always first discover by what species of tenure the interest was held. Upon this fact will depend whether the descent will be governed (*a*) by the common law of Inheritance, as amended by recent statute, (*b*) by local manorial custom, (*c*) by the Statutes of Distribution.

(*a*) The common law rules of Inheritance, as amended by the two statutes known respectively as the Inheritance Act, 1833[2], and Lord St. Leonards' Act[3], may be set out easily and clearly in the form of a code. But, as a preliminary, it is necessary to remember that a very recent statute, the Land

Common Law rules.

Land Transfer Act, 1897.

[1] 3 & 4 Will. IV. c. 106. See Bracton, lib. II. capp. 29–32.

[2] 3 & 4 Will. IV. c. 106.

[3] 22 & 23 Vict. (1859) c. 35. §§ 19, 20.

Transfer Act, 1897[1], has made a most important alteration in the form, though (probably) not in the material of the rules of Descent. By this statute, it is provided[2] that the real estate of every deceased person shall, on his death, vest in his personal representative for the time being, notwithstanding any testamentary disposition which he may have made of it. The personal representative will hold the estate, subject to the payment of preferential claims, as trustee for the person who would previously have been entitled to it as devisee or heir[3]. And if, at the end of a year from the death of the testator or ancestor, the personal representative has not already assented to the devise, or conveyed to the heir at law of the deceased, either of these, as the case may be, may obtain an order for conveyance from the court, or, in the case of registered land, an order for registration as proprietor[4].

Effect of the Act.

Apparently, the Land Transfer Act, 1897, makes no change in the ultimate rights of persons claiming under the rules of Inheritance. It merely postpones the legal vesting in them of the deceased's interests; and alters the character of their title. Instead of acting, immediately upon the decease of their ancestor, as owners of the land, they will be required to substantiate their claim against the personal representative. Whether, after conveyance, they will be entitled to sue for trespass done to the land by strangers between the decease of the ancestor and the conveyance by the personal representative, seems, on principle, doubtful. But there can be little doubt that the personal representative would be compelled to lend his aid to the enforcement of such a claim. An old academic moot has, however, been effectually disposed of by the Act; for it is clear that no one can now be made an heir against his will[5]. The personal representative cannot compel any one to accept a conveyance; and no one can be registered

[1] 60 & 61 Vict. c. 65.

[2] § 1. Technically, the personal representative will acquire the estate as 'real representative.' But the difference will be purely verbal.

[3] § 2. [4] § 3.

[5] See an allusion to this difficulty under the subject of Disclaimer.

as a proprietor of land without his consent. The so-called 'identity' of heir and ancestor is, in fact, gone for ever.

It will be observed also, that the rules of Inheritance can apply, in strictness, only to estates in fee simple and fee tail. We have seen[1], however, that there is a quasi-descent of estates *pur auter vie*; and, if the word 'heir' or 'heirs' be used in the original limitation of such an estate, the estate will, on the death of its first owner, pass to (or for the benefit of) the person who answers the description of heir of the deceased, according to the rules of inheritance affecting the tenure by which the estate is held. As regards estates tail, too, it must be carefully remembered that no one can inherit them who is not actually descended from the original donee, and who does not fulfil the requirements of the original limitation. Descent of estates *pur auter vie.*

With these reservations, the following are the rules for ascertaining the heir of a deceased intestate, according to the common law:—

(i) *In every case descent must be traced from the purchaser.* (Inheritance Act, 1833, 3 & 4 Will. IV. c. 106. § 1.) Purchaser.

This, though an amendment of the previously existing law[2], is in the true spirit of feudal principles, which regarded the original donee of a fief as the meritorious person whose blood could alone qualify for succession by inheritance. In the later period of feudalism, perhaps owing to the difficulty of tracing the original donee at a time when feoffments could be made without writing, but more probably owing to the respect paid by the common law to actual seisin, the rule was established that the person last seised should be deemed the stock of descent. The Inheritance Act has abolished the maxim *seisina facit stipitem.*

By the Inheritance Act[3], the 'purchaser' is defined as being 'the person who last acquired the land' (i. e. the interest in question) 'otherwise than by descent, or than by any escheat, partition, or enclosure, by the effect of which the land shall

[1] Ante, pp. 54-6.

[2] Watkins, *Descents*, pp. 23 et seq., with qualifications there noticed.

[3] 3 & 4 Will. IV. c. 106. § 1.

have become part of or descendible in the same manner as any other land acquired by descent[1].' But the following sub-rules are useful for the interpretation and application of this general definition.

(*a*) The person last *entitled* to the land is to be deemed the purchaser, unless it be proved that he inherited; and then the person from whom he inherited, unless similar proof be forthcoming. And so on (Inheritance Act, § 2).

This is introducing a new principle. The old law did not recognize *title* as a stock of descent, regarding it as too uncertain a matter to be made the basis of Inheritance. The distinction between seisin and title is, of course, obvious. A man may be seised who is not entitled, and conversely.

(*β*) A devise coming into operation after December 31, 1833, and professing to give land to the heir of the testator, and an assurance executed after that date professing to convey to the assurer or his heirs, are to constitute the devisee or assurer respectively as purchasers (Inheritance Act, § 3). This is likewise an alteration of the old rule, which deemed such limitations nugatory[2].

(*γ*) A limitation to the heirs (or the heirs of the body) of any person, in an assurance executed or a devise coming into operation after December 31, 1833, though it make such heirs purchasers for ordinary purposes, yet is to constitute the person whose heirs are named the stock of descent for purposes of inheritance (Inheritance Act, § 4).

This clause is of some importance in cases where the earlier limitations of a settlement have unexpectedly failed, and the ultimate limitation takes effect. Thus, suppose a settlement made by *X* on the marriage of his daughter. There will be the usual limitations in favour of the daughter and her husband for life, followed by limitations to portions' trustees, then by successive estates tail to the sons and daughters of the

[1] Presumably this last clause refers only to the title by 'enclosure.'

[2] Watkins, pp. 173–91, and cases therein cited. The rule, however, was not without exceptions.

marriage, with an ultimate remainder to the heirs of *X*, the settlor. Suppose *X*'s daughter to die childless, shortly after the marriage, leaving her husband who, we will assume, takes a life estate under the settlement, surviving her. Upon the husband's death, the settlor (as is likely) is dead too, the settlor's heir will take in remainder, and, by virtue of section 3 of the Inheritance Act, as a purchaser. But, by virtue of section 4, in the event of *his* death intestate, *X* will be the person from whom descent must be traced. The rule in *Shelley's* Case would have no application, as there is no limitation in favour of the settlor. It would seem that section 4 of the Inheritance Act has merely declared the old law[1].

(δ) If there be a total failure of heirs of the purchaser or (in the case last put) of the ancestor, descent is to be traced from the person last entitled, as if he had been purchaser (Lord St. Leonards' Act, § 19[2]).

This rule is, as has been said, quite contrary to feudal principles, and was only introduced in 1859, to lessen the hardship of escheat in certain cases. It is easy to imagine circumstances in which it might have that effect. Suppose a bastard to purchase lands and die intestate, leaving an only child, who himself dies intestate and without issue. As the issue of the purchaser would be extinct, no one could claim as heir to him. But his widow, or any relation of hers, could succeed as heir of the child, and thereby prevent an escheat.

(ii) *The inheritance descends, in the first place, to the issue of the purchaser* AD INFINITUM*; but the nearer degree excludes the remoter, in the same degree males exclude females, and, among males, the elder excludes the younger.* (Bracton, fo. 64. Blackstone, *Comm.*, 4th ed., II. pp. 208–16.)

Preference of males to females, and primogeniture among males.

This rule has for so long been an unquestioned part of the common law, that it is hard to find any express authority for it. Even Bracton states it inferentially; Littleton does not think it necessary to state it. Every dispute on the subject of inheritance which has come before the courts for centuries

[1] *Moore* v. *Simkin* (1885) 31 Ch. D. 95. [2] 22 & 23 Vict. (1859) c. 35.

past, has proceeded upon the assumption that it is elementary law. Nevertheless, the student of legal history would not find it hard to discover a period at which even this elementary rule was in a doubtful condition[1]. But such investigations are out of place here.

Examples. It may, perhaps, be worth while to give a simple illustration of the working of the rule. *A* purchases land in fee simple, and dies, leaving *B* and *C*, sons, and *D*, *E*, and *F*, daughters, surviving. *B*, *C*, *D*, *E*, and *F* are married, and have issue. *A*'s estate is capable of descending to any of his issue; but, in the case put, the children, who are in the nearer degree, will exclude the grandchildren; *B* and *C*, the sons, will exclude *D*, *E*, and *F*, the daughters; and *B*, the eldest son, will exclude *C*, the younger. The inheritance, therefore, vests in *B*. Had there been but one son, he, likewise, would have taken the whole inheritance. But had *A* been the father of daughters only, such daughters would have taken the inheritance in equal undivided shares, as parceners. In case of the death of any one of them intestate, before partition of the inheritance, her heirs alone, and not the heirs of *A*, would be entitled to inherit her share. This sub-rule, which, it can hardly be denied, is a real exception to the maxim that all descent must in the first place be traced from the purchaser, has been confirmed by recent decision[2]. We now come to a very important rule, the complete understanding of which is essential to the interpretation of the rule which we have just been considering.

Representation. (iii) *The lineal issue of any person deceased who, if he had been living, would have been entitled to the whole of, or a share in the inheritance, stand in that person's place in calculating the descent, the same rules of priority amongst them being observed as*

[1] See Digby, *History of the Law of Real Property*, cap. ii. and the passage from Bracton there quoted.

[2] *Cooper* v. *France* (1850) 19 L. J. (N. S.) 313; R. C. ix. 301. To the cases on this point mentioned by the late Mr. Joshua Williams in his interesting Appendix (C) may be added that of *Reading* v. *Rawsterne* (1702) 2 Ld. Raymond, 829.

in other cases. (Bracton, fo. 64 b. Blackstone, *Comm.*, 4th ed., II. p. 217.)

Thus, in the case above put, if *A*'s eldest son, *B*, had died in *A*'s lifetime, leaving issue, that issue would all be preferred to *C*, and, *a fortiori*, to *D*, *E*, and *F*, notwithstanding that all these are in a degree nearer to *A*. And thus it may very well happen, that a grand-daughter by a deceased eldest son may take the estate in preference to a younger son, notwithstanding that she is of remoter degree and of the female sex. Putting the case another way, the entire issue of a deceased prior claimant are preferred to a living claimant whose claims were inferior to those of the deceased. And this rule must be extended to the remotest issue. It is this doctrine of representation which makes the calculation of a descent of real estate so entirely different from the calculation of a distribution of personalty, in which representation is only very slightly recognized. The difference is often expressed by saying, that realty descends *per stirpes*, personalty, *per capita*. But the expression is not accurate. Examples.

(iv) *Upon failure of issue of the purchaser, the inheritance descends to the nearest lineal ancestor, and his issue* AD INFINITUM, *the whole paternal line being preferred to any of the maternal, and, in each line, all the male ancestors and their issue being preferred to any of the female and their issue.* (Inheritance Act, §§ 6 and 7.)

This is one of the most important changes in the law made by the Act of 1833. By the old law, the inheritance could never pass to the ancestors of the person from whom descent was traced [1]. The old rule was generally justified by the use of a metaphor, which treated the inheritance as a heavy body, which, it was argued, might fall perpendicularly or even laterally, but could never ascend. But, of course, a metaphor is not an argument; and the true origin of the old rule was probably to be found in the feudal doctrine, that no one ought to succeed to a fief who was not of the blood of the

[1] Bracton, fo. 62 b; Co. Litt. 10 b.

first donee. And as, *ex hypothesi*, every ancestor between the person dying seised and the original donee, had succeeded before the former, by virtue of the ordinary rules, there could be no ancestors of the first donee's blood left alive. At the time when Wills of land were not recognized, such an assumption was tolerably correct, but not entirely. For a man might have enfeoffed his grandson during the lifetime of the latter's father, and yet, on the death of the grandson, his father would be incapable of inheriting. The inconsistency of the rule was further shown by the fact that an elder brother might succeed to a younger, through their common father, although he, the father, could not do so[1]. But, most absurdly of all, though a man could not directly inherit from his son, yet, if the latter died seised, leaving an uncle (his father's brother), the uncle could succeed, and, on *his* death intestate, the father, as the uncle's brother, could inherit the estate[2]. To mitigate the unreasonableness of this anomaly, the doctrine was established that brothers and sisters took directly from one another, and not through the common ancestor. And this doctrine was highly convenient in cases in which the common ancestor was a person through whom inheritance could not be traced, e.g. an attainted traitor[3]. But it has been expressly abolished by the Inheritance Act[4]; and there is now really no such thing as collateral succession to realty, though collaterals do in effect succeed, as issue representing the deceased common ancestor.

Results of rule.

The effect of the new rule is, it will be observed, to give the preference in claims by descent to the father of the deceased over the deceased's brothers and sisters, and all descendants of the latter; but the preference does not extend to the mother, as, by the express provisions of the rule, all the

[1] Co. Litt. 13 b. [2] ib. 10 b.

[3] See, for a recent example, *Kynnaird* v. *Leslie* (1866) L. R. 1 C. P. 389. The common ancestor in this case was a brother of the famous Earl of Derwentwater, attainted in 1716.

[4] 3 & 4 Will. IV. (1833) c. 106. § 5. The ability to inherit through an attainted ancestor is, however, reserved by § 10.

paternal relatives of the deceased are to be preferred to his maternal relatives, nor to grandparents, as, by the operation of a former rule, the brothers and sisters and their issue will represent the deceased's father, if he, too, be dead. Thus, if *A* purchase a fee simple and die, leaving a grandfather and a nephew by a deceased brother, the nephew, though but in the third degree of relationship, will succeed in preference to the grandfather, who is in the second. Example

The new rule also diminishes the importance of another question, which frequently arose under the old law. When seisin made the stock of descent, it was often of the first importance to know in what way the deceased had come by his estate. For if he had acquired it as heir, and had left no descendants, the succession of his collateral heirs would depend upon whether he had inherited through his father or his mother. Suppose, for example, *A* had died intestate, leaving an uncle by his father's side, and two nieces by his mother's, then, if he had inherited his estate from his father, his uncle would be his heir, if from his mother, his nieces would inherit as parceners [1]. And this question may still be raised, if, as is provided by Lord St. Leonards' Act [2], resort is had to the person last entitled, as the stock of descent, on failure of the heirs of the purchaser. But, in the normal case, where descent is traced from the purchaser, the Act of 1833 declares, as we have seen, that preference shall always be given to the paternal ancestors and their descendants [3]. Line of descent. Example

It is not a rule of law, but a consequence of the rules of law, that the preference accorded by the same section to the male ancestors of each branch and their descendants over the female ancestors and their descendants, is more apparent than real. To take the simplest case. *A* dies intestate and without issue, leaving only cousins by the father's side. To

[1] Co. Litt. 12 a.

[2] 22 & 23 Vict. (1859) c. 35. § 19.

[3] 3 & 4 Will. IV. (1833) c. 106. § 7. The failure of paternal ancestors may be inferred by a jury from reasonable grounds of presumption (*Greaves* v. *Greenwood* (1877) 2 Ex. D. 289).

establish their descent, these cousins will have to show their relationship to the common male ancestor, viz. the grandfather, who, and his descendants, are to be preferred before the grandmother and her descendants. But, in all probability, these cousins will be descendants of the grandmother as well as of the grandfather, though it is possible, of course, that they may be the descendants of the grandfather by a former or subsequent marriage. The real hardship (it would seem), inflicted by the rule, occurs when the mother of the intestate is postponed to his remote paternal relatives. But this consequence is in accord with the general principles of English land law.

Maternal ancestors.

(v) *The mother of the more remote male ancestor, paternal or maternal, and her descendants, is preferred in all cases to the mother of the less remote and her descendants.* (Inheritance Act, § 8.)

This rule, which is of very slight importance in practice, is said to be justified by feudal principles, the presumption being, that the mother of the more remote ancestor is more likely than the mother of the less remote to be of the blood of the purchaser. The subject will be found discussed, in an incidental and rather unscientific manner, by Blackstone[1], in reference to the case of *Clere* v. *Brook*[2]; and Blackstone's opinion is now declared by the statute to be law. There does not appear to be any modern case in which the doctrine has been applied[3].

Half blood.

(vi) *Collaterals of the half blood may inherit—next after any relation in the same degree of the whole blood and his issue, where*

[1] *Comm.* (4th ed.) II. p. 238 seq. [2] (1572) Plowd. 450.

[3] *Greaves* v. *Greenwood* (1877) 2 Ex. D. 289, quoted by Williams (*Real Property*, 17th ed., 213 n), does not really apply the doctrine at all. It merely decides that reasonable presumption of the absence of superior claims in an old pedigree may be accepted by a jury as proof. In the case of *Davies* v. *Lowndes* (1838) 5 Bing. N. C. p. 169, it was probably alluded to by C. J. Tindal. But neither at that stage of the case, nor at the first trial, does the point seem to have been considered material. At the first trial, in fact, the Chief Justice speaks of the point as unnecessary to be decided (1 Bing. N. C. 616. See report on bill of exceptions, in 4 Bing. N. C. 478).

the common ancestor is a male, and next after the common ancestor where the latter is a female. (Inheritance Act, § 9.)

The admission of the half blood is one of the most radical changes effected by the Inheritance Act. Under the old law, the half blood could never inherit; and to such an extent was the doctrine carried, that, even if *A* purchased lands in fee simple and died intestate, leaving two sons, *B* and *C*, by different wives, and *B*, the elder, took seisin in deed and likewise died intestate and without issue, *C*, the younger son, could not inherit, though he was notoriously of the whole blood of the purchaser, his father. For, according to the rules which then prevailed, he had to make himself heir to his brother, not to his father; and, as to his brother, he was of the half blood [1]. But, equally under the first as under the sixth rule as above stated, he would now be entitled to inherit.

The last half of the rule on the subject of the half blood seems, at first sight, somewhat puzzling and arbitrary. But, if carefully examined, it will be found to be merely a consequence of the preceding canons of descent, not a substantive rule. For, suppose *A* to purchase land in fee simple and die intestate and without issue, leaving full brothers and sisters, half-brothers by the father's side, and half-brothers by the mother's. His heir will be his father, if living; if he be dead, his eldest full brother as representing his father, and, on his dying intestate and without issue, his other full brothers and sisters in the legal order. Failing these, resort is then had to the brothers of the half blood on the father's side (*fratres consanguinei*) *as representing the father*, by virtue of rule 3. But, on their failure, and that of all other paternal relatives, resort is then, by rule 4, had to the mother, failing whom, those of her descendants who have not yet inherited are called by virtue of rule 3. But these can be none other than *A*'s half-brothers by the mother's side, (*fratres uterini*), her other issue being also the issue of

[1] Co. Litt. 14 b.

A's father, and, as such, already exhausted. Thus we have established as the order of succession—

1. *A*'s father,
2. *A*'s whole brothers and sisters and their issue,
3. *A*'s half-brothers on the father's side and their issue,
4. *A*'s mother,
5. *A*'s half-brothers on the mother's side.

And this will be found to be precisely the order indicated by the section.

Before we leave our consideration of the Inheritance Act, there are three points which should be carefully noted:—

Descent of estates tail.

The first is, that the rules which have just been quoted, as regulating the descent of an estate in fee simple, govern also, but to a limited extent, the descent of an estate tail. No one can succeed to an estate tail who is not actually a descendant of the first donee; therefore, no rules of inheritance governing the succession of ancestors and, consequently, collaterals, can affect the descent of estates tail. To an estate held in special tail, no one but a descendant of the specified marriage can succeed; therefore, all issue of the donee by any other marriage may be treated merely as non-existent. An estate tail limited to persons of a particular sex can only be inherited by persons who can trace their descent from the first donee exclusively through that sex; to this extent, therefore, the rules of inheritance affecting a fee simple are modified. But, save where modifications are necessarily introduced by the terms of the gift in tail, the ordinary rules of inheritance will prevail. Thus, to an estate in tail general, the eldest son of the donee and his issue will succeed before the second son or his issue, the issue of all his sons before his daughters or their issue; and so on.

Deaths before 1834.

The second point is, that the Inheritance Act and its amendment only govern the descent of inheritances occasioned by deaths occurring after December 31, 1833[1]. And even to these it will not apply, if the descent is to be traced by

[1] 3 & 4 Will. IV. c. 106. § 11.

virtue of a limitation to the heirs (as purchasers) of any one contained in any instrument coming into operation before January 1, 1834, even though the person to whose heirs limitation is made should die after that date[1]. All such cases will be governed by the old rules of inheritance; and, as there is no reason why such cases should not occur in practice for many years to come[2], it will be well here just to recapitulate the points in which the statutes of 1833 and 1859 have altered the old law.

Differences between the old and the new law.

(i) The purchaser, or, failing him, the person last entitled, is now the stock of descent. In cases not covered by the Acts, descent will be traced from the person last seised. (Ante, pp. 195–7.)

Stock of descent.

(ii) Formerly, a conveyance by a man to himself or a devise to his heirs was inoperative; now it constitutes him or them 'purchasers,' and, therefore, stocks of descent. In the case of a limitation to the heirs of a stranger, as such, the stranger is deemed the purchaser. (Ante, p. 196.)

Conveyance to the conveying party, or to 'heirs.'

(iii) Brothers and sisters no longer inherit directly, but through the common ancestor, to whom, if of the male sex, they are postponed. (Ante, p. 200.)

Collateral succession.

(iv) Lineal ancestors may now inherit; by the old law they were entirely excluded. (Ante, p. 199.)

Succession of ancestors.

(v) The half blood may now inherit, after failure of the whole blood; formerly they were entirely excluded. (Ante, pp. 202–4.)

Half blood.

(vi) Descent may be traced through an attainted person who has died before the person whose death caused the descent. (Ante, p. 200 n.)

This last provision of the Act may still be important; inasmuch as the Forfeiture Act, 1870[3], is not retrospective. It will be observed that the Inheritance Act only allows descent to be traced through a *deceased* traitor or felon. Thus,

[1] 3 & 4 Will. IV. c. 106. § 12.

[2] In fact, the adoption of the purchaser as the stock of descent makes it all the more likely that they should occur.

[3] 33 & 34 Vict. c. 23. § 1.

suppose *A*, purchaser of an estate in fee simple, to die intestate and without issue in 1875, leaving a brother who had been attainted of felony and condemned to penal servitude in 1865, and a nephew, son of that brother. Neither by virtue of the Inheritance Act nor of the Forfeiture Act could, it is conceived, either the brother or the nephew claim the inheritance[1].

Local rules of inheritance.

The third and last point to be noticed is, that the Inheritance Act, in spite of some rather loose expressions in the first section[2], has not put an end to local variations in the rules of Inheritance, such as the descent to all sons in gavelkind, or the descent to the youngest son in Borough English[3]. It merely alters them in the points expressly established by the Act as innovations on the old law. The extreme difficulty of applying some general rules to local customs, while leaving the custom to prevail in other respects, is well illustrated by the

Muggleton v. Barnett.

case of *Muggleton* v. *Barnett*, decided in 1857[4]. The plaintiff claimed copyholds to which the custom of Borough English applied. The manorial custom was proved to be, that on failure of the issue of the person *last seised*, the land descended to his youngest brother, and, failing him, to his youngest son. There was also evidence of a descent to the youngest son of an uncle. But, by the terms of the Inheritance Act, the descent had to be traced from the *purchaser*. The plaintiff was the youngest son of the youngest brother of the *purchaser*, but he was the youngest son of the youngest brother of the great-grandfather of the person *last seised*. He contended that the Inheritance Act put the purchaser for all purposes in the position of the person last seised, or, failing that contention, that the evidence of 'junior right' was sufficient to warrant a presumption of the existence of a general rule in the manor

[1] The statement of the late Mr. Challis, in his very learned work, *The Law of Real Property* (2nd ed., p. 213), that the Act of 1870 has rendered the 10th section of the Inheritance Act superfluous, was, it is suggested, made without due consideration.

[2] 3 & 4 Will. IV. (1833) c. 106. § 1.

[3] As to these, see ante, pp. 23–5.

[4] 2 H. & N. 653.

in favour of succession by juniority. But the Court, though much divided in opinion, held that the Act only adopted the purchaser for the simple purpose of making him the stock of descent, not of substituting him for the person last seised in the interpretation of customs, and that a custom could only be proved by showing that it had been acted upon [1].

(*b*) As has been previously stated, the rules of descent in copyhold tenure are determined by the particular local custom, subject to the general principles introduced by the Inheritance Act [2] and Lord St. Leonards' Act [3]. The case of *Muggleton* v. *Barnett* [4], the facts of which have just been given, illustrates so clearly the working of this rule, that further proof of it is needless. It may be useful to remark, however, that this case, and the later case of *Smart* v. *Smart* [5], seem to decide conclusively that a manorial custom of descent, which varies from the common law, will be construed strictly, that it will not be extended by analogy to cases which fall outside its literal terms, and that no evidence but that of actual admittances by virtue of the custom, will be accepted as proof of its existence. Copyhold rules.

The fact that the statute of *Quia Emptores* [6] does not apply to copyholds, is, doubtless, responsible for the survival, in copyhold inheritance, of an interesting feature which once applied to all inheritances. As against all other persons but the lord, the heir's title commences from the death of his ancestor, for the Land Transfer Act, 1897, has no application to copyholds [7]. But, in order to qualify himself to act as a tenant of the manor, the heir must obtain admittance from the lord. As this ceremony is usually accompanied by the payment of a fine, the heir who was not anxious to sit on homages might very well desire to postpone his admission till circumstances made it incumbent on him to obtain formal Admittance of the heir.

[1] See the Note on this case in Appendix (B) to Williams on *Real Property*.

[2] 3 & 4 Will. IV. (1833) c. 106.

[3] 22 & 23 Vict. (1859) c. 35.

[4] (1857) 2 H. & N. 653.

[5] (1881) 18 Ch. D. 165.

[6] 18 Edw. I. (1290) c. 1.

[7] 60 & 61 Vict. c. 65. § 1 (4).

evidence of his title. But this contingency is provided for by the existence of various customs, which impose severe penalties upon heirs who neglect to claim admittance within a reasonable time. Where there is no special custom, by a curious generalization which, in effect, constitutes a rule of common law, the lord may, after due proclamation at three successive courts, seize the tenement into his hands *quousque*, i. e. until an heir appears and claims admittance [1]. It should be carefully remembered that the fine is not due until the admittance has taken place [2]. The lord cannot, therefore, refuse to admit the claimant, on the ground that he has not tendered his fine. He must admit him first, and then sue for the fine [3]; or, if the admitted tenant is an infant, he may seize the land again *quousque*, under the special provisions of a statute of the year 1830 [4]. In the ordinary way, a lord seizing *quousque* is not bound to account for the profits of the land [5]; but a lord seizing under the statute of 1830 can only hold until the incomings of the land have paid the fine and costs [6].

Seizure *quousque.*

Mandamus to compel admittance.

On the other hand, if a lord refuses improperly to admit a new tenant, he may be compelled by *mandamus*, issued by the Queen's Bench Division, to do so. There was at one time an indisposition on the part of the Courts to grant a *mandamus* on behalf of an heir, on the ground that he had, even before admittance, all his rights against every one but the lord [7]. But it has now been settled that a *mandamus* will lie for the heir, as well as for any other person claiming admittance [8].

[1] Stated by Lord Abinger, C. B., in *Twining* v. *Muscott* (1844) 12 M. & W. 832. The lord cannot claim an absolute forfeiture on failure of heirs to seek admittance, unless there be a special custom to that effect (*Salisbury's* Case (1662) 1 Levinz, 63, admitted as good law in *Tarrant* v. *Hellier* (1789) 3 T. R. at p. 172).

[2] *Rex* v. *Lord of the Manor of Hendon* (1788) 2 T. R. 484.

[3] *Regina* v. *Wellesley* (1853) 2 E. & B. 924.

[4] 11 Geo. IV. & 1 Will. IV. c. 65. § 6.

[5] *Underhill* v. *Kelsey* (1609) Cro. Jac. 226.

[6] 11 Geo. IV. & 1 Will. IV. c. 65. § 6.

[7] *Rex* v. *Rennett* (1788) 2 T. R. 197.

[8] *Rex* v. *Brewers' Co.* (1824) 3 B. & C. 172.

Whatever doubts may have formerly existed [1], it seems now to be beyond question, that both customary freeholds and copyholds cease, upon enfranchisement, to be affected by customary rules of descent, at least when the enfranchisement takes place under the Copyhold Act, 1894 [2]. Enfranchisement.

(*c*) We have now only to deal with the distribution of leaseholds. Leaseholds, like all other personalty, pass on the death of their owner, whatever the terms of his Will, to his personal representatives. These may be either (i) an executor or executors, when he has made a Will and named (directly or 'according to the tenour') a person or persons to carry it out; (ii) an administrator or administrators, when he has made no Will, and the Court is, therefore, obliged to appoint a person or persons to administer his estate; (iii) an administrator or administrators 'with the will annexed,' when he has made a Will, but has not, directly or indirectly, named any one to carry it out, or, if he has done so, the person or persons so named have refused or been unable to take up the office. If there is an executor willing to act, the Court, upon being satisfied of the regularity of the Will, issues to him a 'Probate' or official copy thereof, which is his formal title to deal with the testator's property, though his right accrued immediately on the testator's death. If recourse must be had to an administrator, he is appointed by the Court, which grants him 'Letters of Administration,' with or without a Will annexed (as the case may be). The title of the administrator only begins with the issue of the Letters of Administration; but, having begun, it relates back to the death of the intestate, so that he can enforce any rights which have accrued in the interval. Leasehold rules.

To the personal representative of the deceased leaseholder belongs the power of disposing of his leaseholds for payment of the deceased's debts, and, in the event of his having left Statute of Distribution.

[1] Elton, *Copyholds*, 2nd ed., p. 127 and n. I cannot trace the reference to Co. Litt. 110 b.

[2] 57 & 58 Vict. c. 46. § 21 (1) (c).

a Will, his legacies. But, subject to these contingencies, and to the possibility that the leaseholds may have been specifically bequeathed, or included in a general bequest to any particular person or persons, they will have to be distributed, along with the rest of the deceased's personalty, amongst his next of kin, in accordance with the Statute of Distribution [1]. It is the effect of this statute which we have now to summarize; and, as in the case of the inheritance of socage estates, it will be well to state that effect in the form of simple rules.

Stock of descent.

(i) *The person whose next of kin are to be sought is always the person last entitled; there is no question of purchaser or person last seised.* (Statute of Distribution, § 5.)

Widow and issue.

(ii) *If the intestate leave a widow and issue, the widow takes one-third, and the issue the remaining two-thirds equally between them* PER STIRPES, i.e. the descendants of a deceased child will represent their parents or ancestors. (Statute of Distribution, § 5.)

This rule is easily intelligible. Supposing *A* to die intestate, leaving a widow, a daughter, and three grandchildren by a deceased son. The widow takes one-third, the daughter one-third, and each grandchild, irrespective of age or sex, one-ninth. As the Roman arrangements, on which the ecclesiastical law of Distribution was mainly based, gave the widow no share in her husband's estate, her share of one-third was very probably borrowed from the law of dower. But, in the case of personalty, the widow takes her share absolutely, not for life.

Widow or issue.

(iii) *If there are no issue of the deceased living at his death, the widow takes one half; if the deceased left no widow, and issue survived him, the latter take all,* PER STIRPES [2]. (Statute of Distribution, §§ 6 and 7.)

[1] 22 & 23 Car. II. (1670) c. 10; explained by 29 Car. II. (1677) c. 3. § 25, and both made perpetual and amended by 1 Jac. II. (1685) c. 17. § 7. It was formerly the rule that an *executor* might retain undisposed of personalty for his own benefit. But the rule was abolished by 11 Geo. IV. & 1 Will. IV. (1830) c. 40. An estate *pur auter vie* is distributed as personalty, when there is no special occupant (14 Geo. II. (1740) c. 20. § 9).

[2] The Act, which is very badly drawn, speaks only of 'children' in § 7; but there can be no doubt that representatives of deceased children

With regard to the succession of issue, an opinion was for some time held, that the doctrine of representation only applied when the claimants were of unequal degree of relationship to the deceased. Thus, if *A* died intestate, leaving a daughter, two grandchildren by a deceased son, and three by a deceased daughter, it was admitted that (subject to the widow's rights) the estate would go, as to one-third to the daughter, as to another third, equally between the two children of the deceased son (i. e. one-sixth each), and, as to the remaining third, equally between the three children of the deceased daughter. But it was said [1], that when all the claimants were of equal degree, e. g. in the case put, if there had been no surviving daughter, they would take *per capita*, that is, equally. But this doctrine was decisively overruled by the late Vice-Chancellor Wickens in *Ross' Trusts*, decided in 1871 [2].

(iv) *Any child of the deceased, other than his heir at law, who has received an advancement from the deceased during his lifetime, must, if he claims a share of the estate to be distributed, bring this advancement into account, so that the shares of all the children may be made equal.* (Statute of Distribution, § 5.) Hotchpot.

This rule, known as the 'hotchpot' rule, and said to be founded on the custom of London, has given rise to certain difficulties, with regard to which the following points have been decided:—

(*a*) The provision binds representatives of deceased children, e. g. grandchildren claiming through a deceased son must bring into account an advancement made to their father [3].

(*b*) It does not operate to enlarge the share of the widow, i. e. the widow takes one-third of the actual estate of the deceased, no more [4].

(*c*) It only applies to advancements by a father; advance-

are included. The textbooks, e. g. Blackstone, Burton, Williams (*Executors*), do not seem to notice the point.

[1] e. g. Williams, *Executors*, 9th ed., p. 1368.

[2] L. R. 13 Eq. 286.

[3] *Proud v. Turner* (1729) 2 P. Wms. 560.

[4] *Kircudbright* v. *Kircudbright* (1802) 8 Ves. Jr. 51.

ments by a mother to one of her children are not taken into account in distributing her estate [1].

(*d*) The exemption of the heir at law from the necessity of bringing an advancement into hotchpot extends only to an advancement *of land;* in respect of personalty, he stands on the same footing as other children.

This point, though left vague by the early part of the section, is placed beyond doubt by the concluding words, and has been recognized by legal decision [2].

Next-of-kin.

(v) *Failing issue of the deceased, the share which they would have taken is divided equally amongst his next of kin,* i.e. *among those of his relatives who occupy the nearest degree of blood-relationship to him.* (Statute of Distribution, §§ 6 and 7.)

Thus, if the deceased left a father, all the estate will go to him [3]; if a mother, but no father, she shares equally with the brothers and sisters and their representatives, by virtue of a special statute [4]. According to principle, the father and mother ought to share equally where both survive, now that the Married Women's Property Acts have constituted her a *feme sole* in respect of property. But it is unlikely that the Courts will take that view without express legislation. If the deceased left no parents, his brothers and sisters will share his estate equally; and the issue of any of them who may have died in his lifetime will represent their parents. But the right of representation among collaterals is expressly stopped by the Act at the *children* of brothers and sisters; and, even in their case, it only applies if there be a brother or sister of the deceased living [5]. Beyond brothers and sisters, the nearer degree rigidly excludes the more remote; so that a grandmother, who is in the second degree, takes all to the exclusion of an aunt, who is in the third [6]. A very curious

[1] *Holt* v. *Frederick* (1726) 2 P. Wms. 356.
[2] *Kircudbright* v. *Kircudbright* (1802) 8 Ves. Jr. 51.
[3] *Blackborough* v. *Davis* (1701) 1 P. Wms. 40.
[4] 1 Jac. II. (1685) c. 17. § 7. [5] *Walsh* v. *Walsh* (1695) Prec. Ch. 54.
[6] *Blackborough* v. *Davis* (1701) 1 P. Wms. 40.

survival of the old doctrine, that between brothers there is but one degree of relationship, has led, however, to the rule that brothers and sisters and the children of deceased brothers and sisters exclude grandparents altogether; and the rule, though anomalous, is too firmly fixed to be questioned [1]. A grandfather by one parent and a grandmother by the other share equally [2]; and the half blood equally with the whole [3]. There is, of course, no preference of age or sex in the distribution of personalty.

The local customs of distribution in London and York and certain other places were expressly saved by the Statute of Distribution; but it is provided by the amending Act that this saving only applies to the distribution amongst next of kin, not to the rights of the administrator [4]. The exceptional customs were, however, abolished by statute in 1856 [5].

It must be remembered that the claims both of the heir and of the next of kin on intestacy are now modified by the provision for the widow made by the Intestates' Estates Act, 1890 [6], referred to in a later chapter [7].

[1] *Evelyn* v. *Evelyn* (1754) 3 Atk. 762.
[2] *Moor* v. *Barham* (1723) cited in *Blackborough* v. *Davis*, 1 P. Wms. at p. 53.
[3] *Watt* v. *Crooke* (1690) 2 Vern. 124; Shower, P. C. 108.
[4] 1 Jac. II. (1685) c. 17. § 8.
[5] 19 & 20 Vict. c. 94.
[6] 53 & 54 Vict. c. 29.
[7] Post, cap. xvi.

CHAPTER XIII.

2. ESCHEAT AND FORFEITURE.

Escheat.

WE have seen [1] that the principles of tenure require that an inheritable estate shall, on failure of heirs capable of succeeding, return to the creator of the estate or his representatives. Before the passing of the statute *Quia Emptores* [2], this rule was merely an example of the doctrine of reversion, applied to the particular case of a fee simple. But, as the last mentioned statute forbade the future creation of reversions on fees simple, the theory soon became established, that the existing reversions upon fees simple were not estates or interests in reversion, but merely seignories, with possibilities of escheats.

Quia Emptores.

The impetus given to alienation by the statute *Quia Emptores*, afterwards strengthened and completed by the Statute of Wills [3] and the Act to abolish Feudal Tenures [4], must have enormously diminished the number of escheats, and thereby further emphasized the difference between a reversion (which, except in the case of an estate tail, no act of the particular tenant could destroy) and a chance of escheat, which could be defeated by alienation *inter vivos* or by devise. Moreover, the comparative infrequency of escheats, combined with the impossibility of creating them *de novo* by alienation subsequent to the statute *Quia Emptores*, produced an ever increasing difficulty in proving claims to the incident. And so, the lapse

The Crown's claim.

of escheats to the Crown, which, as ultimate lord, according to feudal theory, of all land within its dominions, stood

[1] Ante, pp. 7–9.
[2] 18 Edw. I. (1290) c. 1.
[3] 32 Hen. VIII. (1540) c. 1.
[4] 12 Car. II. (1660) c. 24.

always ready to claim in default of prior title, grew more and more frequent. The great advantage enjoyed by the Crown consisted in the fact that no positive proof of its title was necessary. Let it only be established that the deceased tenant in fee simple had died intestate and without heirs, and the Crown was at once presumptively entitled. If any intermediate lord claimed the escheat, it was for him to prove his claim; and this, it is to be feared, was not always an easy thing to do, in the face of the opposition of the Crown escheators, whose incomes probably depended on the success with which they established the claims of the Crown[1]. To this rule, however, one substantial exception existed, in the case of copyholds. There the system of keeping records of the state of tenancy on the manorial rolls, and the right of the lord to insist on admittance of the heir, rendered the enforcement of escheat a simple process, with which the royal officials had nothing to do. For, though the Crown might claim the escheat of a manor, it could not claim the escheat of a copyhold within the manor without showing the title of the lord, which would, of course, have been fatal to its claims[2]. Copyhold escheats.

It was very early the practice of the royal officials to hold inquiries or 'inquests of office' upon the death of any notable person, with a view to discovering the existence of escheats, wardships, and other valuable perquisites; and, by ancient prerogative, the Crown was entitled to the assistance in the inquiry of a jury of sworn neighbours, whose verdict in fact constituted the title of the Crown to the escheats declared by it. This once oppressive privilege ultimately became the great safeguard against undue claims by the Crown; and statutes of the fifteenth century[3], by prohibiting any dealings with the Inquests of office.

[1] 34 Edw. III. (1360) c. 13; 36 Edw. III. (1362) c. 13. ('Grievous complaint that the king hath heard by his people of his escheators and their evil behaviour.')

[2] Unless the manor was held directly by the Crown.

[3] 8 Hen. VI. (1429) c. 16; 18 Hen. VI. (1439) c. 6. The rule is renewed by the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), but modified to permit of waiver of the Crown's rights in favour of relatives, without office found.

land by the Crown until after office found, virtually rendered it an essential preliminary to the enforcement of any royal claim by escheat. The same statutes gave power to any party grieved to traverse the inquests[1]; and when, by later legislation[2], the jury were compelled to find of whom the lands claimed were holden, the procedure by inquest of office became a real safeguard against oppressive claims. It has been remodelled very recently by the Escheat (Procedure) Rules, 1889[3], issued by the Lord Chancellor, in pursuance of the Escheat (Procedure) Act, 1887[4].

Private claims.

A private person enforces his claim to an escheat of a legal fee simple in the ordinary way, viz. by an action in the nature of ejectment against the actual tenant[5]. As the escheat actually puts an end to the escheated estate, all interests derived out of the latter will necessarily be avoided, the claimant being entitled to treat as a hostile party any one in occupation of the land[6]. It will be another of the difficulties attendant upon the application of section 4 of the Intestates' Estates Act, 1884[7], which professes to subject incorporeal hereditaments and equitable interests to the law of escheat, to know how claims under the section are to be enforced. It need hardly be said that the age of the title under which the escheat is claimed is no objection to its validity; provided only that the claim is enforced within the statutory period from the death of the intestate.

Forfeiture.

Forfeiture differs from escheat, in that it takes place independently of the failure (actual or fictitious) of the heirs of the tenant, and, in some cases, independently of the claims of reversioners. Since the abolition of forfeiture for excessive

[1] 8 Hen. VI. (1429) c. 16 (6).

[2] 2 & 3 Edw. VI. (1548) c. 8. The provision is expressly re-enacted by the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), § 2 (2).

[3] Printed in W. N. for Aug. 3, 1889.

[4] 50 & 51 Vict. c. 53. The necessity for holding an inquest does not appear to have been abolished by 22 & 23 Vict. c. 21 (Queen's Remembrancers' Act, 1859), § 25.

[5] See the old writ in Fitzherbert, N. B. 144 E. F. [6] ib. 144 M.

[7] 47 & 48 Vict. c. 71.

feoffments [1], treason, and felony [2], and its virtual abandonment in cases of outlawry [3], claims to forfeiture of lands, other than for breach of express condition, have become somewhat rare; but there are still several cases in which they may arise. The following are the most important:—

Mortmain.

(i) *Alienation in Mortmain.* It has for centuries been the policy of English Law, to prohibit the accumulation of lands by individuals or bodies who would withdraw it from circulation. The various ecclesiastical foundations were the first great offenders in this respect, and there can be no doubt that they are the delinquents aimed at in the earlier Mortmain statutes [4]. Religious foundations rarely parted with lands which came to them [5]; and, what was at first even more important to the Crown and other great landowners, they gave no opportunities for claiming escheats, wardships, marriages, reliefs, and many of the other feudal incidents which formed at one time an important part of a great landowner's revenue. Later on, it was discovered that the same unfortunate consequences resulted from the acquisition of lands by trade gilds, municipal burgesses, colleges, and other bodies, whose common characteristic was that they had perpetual succession and a fictitious personality, which enabled them, though really composite bodies, to act more or less as individuals. And so the prohibition against alienation in *mortmain*, which at first had only referred to the 'dead hand' of the saint, was gradually extended to cover all cases in which land was alienated to a *corporation*, i. e. a body having perpetual succession, and a fictitious personality [6].

[1] 8 & 9 Vict. (1845) c. 106. § 4. [2] 33 & 34 Vict. (1870) c. 23.

[3] Outlawry in civil proceedings was, in fact, abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59. § 3); but in criminal proceedings it is still theoretically possible. (Statute Law Revision Act, 1888 (51 Vict. c. 3), § 1.)

[4] 9 Hen. III. (1225) st. I. c. 36; 7 Edw. I. (1279) st. II. preamble, &c.

[5] e. g. It was very doubtful if they had power to do so. (Stat. West. II. 13 Edw. I. (1285) c. 41.)

[6] It would, of course, be a gross anachronism to speak of a 'corporation' in connection with statutes of the thirteenth century. But the important

Licence in mortmain.

The prohibition against mortmain was from the first capable of being relaxed, by the licence of the crown and all the mesne lords of the estate which was proposed to be 'amortized'; and this rule has been retained by recent legislation, with the exception that the licence of the mesne lords is no longer necessary [1]. By the Mortmain and Charitable Uses Act, 1888 [2], it is now provided that upon any assurance of land 'to or for the benefit of . . . any corporation in mortmain' (not duly authorized by licence), the land shall be forfeited to Her Majesty. But the *prima facie* right of the Crown may be defeated by entry on the land by a mesne lord of whom the land is directly held, if such entry is made within twelve months of the date of the assurance; and, if the land is held of more than one mesne lord in gradation, each mesne after the direct lord has six months in which to enforce his claim, after the expiry of the right of his inferior. It is expressly provided by the Act, that rents and services due in respect of the forfeited land are not to be extinguished by the forfeiture [3].

Charitable uses.

Assurances in mortmain must be carefully distinguished from assurances for charitable uses, which do not occasion forfeiture, but, except where expressly permitted, are merely void. Such assurances will be dealt with in a later chapter [4].

Lapse.

(ii) *On failure to present to a vacant ecclesiastical benefice.* It being obviously to the interest of the community that the public provision made for the conduct of ecclesiastical duties shall not be allowed to lie idle, the patron of a vacant living who does not duly exercise his right to present a candidate to the bishop forfeits, or runs the risk of forfeiting, his right. The period allowed the patron is six months from the occur-

notion of 'corporateness' is clearly recognized by the Mortmain statute of 1391 (15 Ric. II. c. 5).

[1] Apparently Edward I had to promise to grant no licences without the consent of the mesne lords (so-called statute of 34 Edw. I. st. III. ann. 1306). But the same reasons which led to the loss of escheats by mesne lords rendered it difficult to prove their rights in the matter of mortmain, and they were abolished by 7 & 8 Will. III. (1696) c. 37.

[2] 51 & 52 Vict. c. 42. § 1. [3] ib. § 3. [4] Post, cap. xvii.

rence of the vacancy[1]. If during that period he does not present, the turn lapses to the bishop of the diocese. If the bishop fails for a similar period to present, the archbishop has the right; on a similar failure by him, the turn lapses to the Crown[2]. But it is to be noticed that the rights of the bishop and archbishop, which arise only from the forfeiture, are absolutely defeated by the expiry of the time limited for their exercise; while, on the other hand, the right of the patron may be exercised at any time before the actual filling up of the benefice[3]. It is said, but on somewhat doubtful authority, that the patron's right is lost absolutely, so soon as the right of the Crown has arisen[4]. A person who claims the right to present on more than one ground, e.g. a bishop as both patron and ordinary, has but the one turn of six months. The rule of forfeiture did not apply to *donative* benefices, in which the patron not merely presented but actually collated and invested the clerk[5]. The somewhat anomalous prerogative right of the Crown to present to a benefice vacant by the promotion of its holder to a bishopric, may also be reckoned an instance of forfeiture, though it is hard to see where the patron's neglect arises. The right does not arise on a promotion to a colonial bishopric[6]. Donatives.

(iii) *On simoniacal dealings.* It is one of the peculiarities of English Law that, although advowsons and even single presentations to benefices are legally saleable[7], yet any pre- Simony.

[1] *Catesby's* Case (1606) 6 Rep. 61 b. It was there decided that the six months in question were six calendar months. If the vacancy occur by reason of deprivation or other act of ecclesiastical authority, the patron's six months only begin to run from the time at which he receives notice from the bishop. *Leak* v. *Episcopum Coventry* (1600) Cro. Eliz. 811.

[2] 6 Rep. 62a.

[3] *Booton* v. *Bishop of Rochester* (1618) Hutton, 24. A benefice is filled up by collation, without institution.

[4] *Cumber* v. *Episcopum Chichester* (1609) Cro. Jac. 216. But it was admitted that if the patron's clerk is actually inducted, and dies or is deprived, or even resigns without covin, the Crown's turn is lost. And see *Booton* v. *Bishop of Rochester*, and *Colt* v. *Bishop of Coventry*, &c. (1612) Hobart, 140.

[5] *Fairchild* v. *Gaire* (1605) Yelv. 60. Donatives are now abolished (Benefices Act, 1898, 61 & 62 Vict. c. 48. § 12).

[6] *The Queen* v. *Eton College* (1857) 8 E. & B. 610.

[7] A presentation cannot now be sold unless it is the whole interest of the vendor (Benefices Act, 1898, § 1 (1)).

sentation which can be proved to be influenced by pecuniary motives is not only void, but effects a forfeiture of the turn to the Crown. The offence of simony may be broadly defined as the giving or receiving of any material advantage in return for spiritual promotion, and this whether the advantage be actually received or only stipulated for[1]. The definition includes, of course, all grosser forms of bribery; but transactions which at first sight seem innocent have also been decided to be simoniacal. An excellent illustration is to be found in the case of *Rex* v. *the Bishop of Oxford*, decided in 1806[2]. The chapelry of *P* had been detached from the parish of *A* at the beginning of the fifteenth century, and endowed with the small tithes of the township in which it was situated. This arrangement was embodied in a deed of the year 1428, which had, however, long been forgotten, and, instead of the small tithes, a fixed salary of £40 a year had been paid to the chaplain. By some means, not stated in the report, the patronage of the chapelry had been vested in the inhabitants of the township, and they had, on the occasion of a vacancy, elected one Pearson to the office. But it seemed that, shortly before the election, the existence of the deed of 1428 had been rediscovered; and an inclosure award made in 1797 had expressly reserved the chaplain's rights under it. At the election of Pearson, the inhabitants, fearing that the claim to tithes would be enforced against them, induced him to sign an agreement by which he agreed to accept an increase of £30 a year in the salary, in lieu of any claim to tithes. As there was every probability that the claim to tithes, if enforced, would bring in about £130 a year, it was clear that this agreement virtually offered the electors a release for an indefinite period of a legally enforceable claim to £60, in

Rex v. *Bishop of Oxford.*

[1] According to the strict interpretation of 31 Eliz. (1589) c. 6. § 46, a presentation can be forfeited for simony even though neither the patron nor the clerk were aware of the corrupt bargain. *Rex* v. *Trussel* (1667) 1 Sid. 329; *Baker* v. *Rogers* (1600) Cro. Eliz. 789. But ? if these cases would now be followed.

[2] 7 East, 600.

return for their suffrages. The bishop, hearing of the matter, refused to license Pearson, and, thereupon, the Crown nominated a clerk, on the ground that the simoniacal agreement of the patrons had worked a forfeiture. The inhabitants proceeded to the election of another candidate, against whom no simony was alleged. But the King's Bench refused to disturb the nominee of the Crown.

Constructive simony.

In addition, however, to the cases of actual simony, there exist, by virtue of various authorities, certain cases of what may be called 'constructive simony,' of which the following are the most important:—

Transfer during vacancy.

(*a*) *The conveyance of a next presentation during vacancy.* This has been recognized, ever since the Reformation, as a simoniacal offence, presumably on the ground that it must be made with a view to the presentation of a particular clerk [1]. But, if the advowson itself is conveyed during a vacancy, the transaction is good except as to the next presentation, which falls to the Crown [2]. It was decided, in the leading case of *Fox* v. *Bishop of Chester* [3], that the fact of the incumbent being *in extremis* at the time of the transfer does not of itself render the transaction simoniacal.

Presentation of himself by purchaser.

(*b*) *The purchase of a next presentation by a clerk, if it be followed by his own presentation.* A purchase by a clerk with a view to his own presentation would, of course, be simoniacal on general principles, as well as within the express words of the 31 Eliz. c. 6. § 5 [4]. But intention is a difficult thing to prove; and, to put an end to disputes of this kind, the Simony Act of 1713 [5] provided that the acceptance of the benefice after the acquisition of the next presentation

[1] The ostensible explanation was that the right was a *chose in action* which, as the law formerly stood, could not be assigned. *Stephens* v. *Wall* (1570) Dyer, 282 b. In *Alston* v. *Atlay* (1837) 7 A & E. 289, it was even held that a sale of an advowson, whilst the existing incumbency was *voidable* by the patron, did not pass the next presentation.

[2] *Leak* v. *Episcopum Coventry* (1600) Cro. Eliz. 811.

[3] (1829) 6 Bing. 1.

[4] Ann. 1589. See *Winchcombe* v. *Bishop of Winchester* (1616) Hobart, 165.

[5] 13 Anne, c. 4, printed as 12 Anne, st. II. c. 12 in some editions.

should, *ipso facto*, render the acquisition simoniacal. And the Act extends to acquisitions made in the names of other persons. But a recent decision has laid it down, that the purchase by a clerk of a life interest in an advowson, followed by a presentation of himself, is not simoniacal; even though the circumstances of the case rendered it impossible for his purchase to cover more than the next presentation[1]. It is also obvious, that nothing in the statutes prohibits a clergyman purchasing the advowson of a benefice, and, after he has offered himself for admission and been inducted, selling the advowson again.

Resignation bonds.

(*c*) *The acceptance of a benefice subject to an engagement for resignation.* This, which is, perhaps, the most extreme case of constructive simony, is partly provided for by the statute of 1589[2], which prohibits the acceptance of any benefit by an incumbent as an inducement to resign. But it will be observed, that the statute only applies to engagements by 'incumbents' to resign benefices held by them at the time of entering into the engagements. Moreover, the penalty imposed by the section is only pecuniary. And so, for a long time, bonds entered into by clerks, undertaking to resign, at the request of patrons, benefices to which they were *about to be* appointed, were held to be good, not only at Law, but also in Equity[3]. But the invalidity of *general* resignation bonds (i. e. bonds conditioned for resignation simply upon request) was decisively established by the leading case of the *Bishop of London* v. *Ffytche*[4] in 1783; and that of specific bonds (i. e. bonds conditioned to resign in favour of specified persons) was equally established, in 1827, by the case of *Fletcher* v. *Lord Sondes*[5], both of these cases being decided by the House of Lords, with the assistance of the judges. Inasmuch as

[1] *Walsh* v. *Bishop of Lincoln* (1875) L. R. 10 C. P. 518.

[2] 31 Eliz. c. 6. § 8.

[3] *Durston* v. *Sandys* (1686) 1 Vern. 411 (law); *Grey* v. *Hesketh* (1755) Amb. 268.

[4] Reported at full length by Cunningham, *Law of Simony*, pp. 59–176. Thirty-seven lords voted in the final judgement, and the victorious party only obtained a majority of one vote.

[5] 3 Bing. 501.

the last decision took the profession completely by surprise, a temporary Act was passed in the same year [1], exempting from penalties those who had previously acted in ignorance of the law which it was supposed to declare. And in the year 1828 was passed the Clergy Resignation Bonds Act [2], which restored, with certain useful modifications, the law as it had been believed to stand during the interval between 1780 and 1827. By the terms of this statute, an agreement to resign a benefice, and a presentation made in pursuance of such resignation, are rendered valid, provided that they fulfil the following conditions :— Resignation Bonds Act.

(α) That the resignation is reserved and exercised in favour of one or one of [3] two persons actually specified in the agreement (§ 1).

(β) That, where two persons are named, they must each be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of one of the beneficial patrons of the benefice (§ 2).

(γ) That the document embodying the agreement must, within two months of its date, be deposited in the office of the Registrar of the diocese in which the benefice is situated, and be open to public inspection (§ 4).

(δ) That any resignation tendered under the agreement must state the name of the person in whose favour it is made, and it is valid only for the purpose of allowing such person to be presented. If such person is not presented within six months, the resignation is void (§ 5).

It must be remembered that the Act of 1828 only sanctions agreements to resign benefices of which the patronage rights are held as private property. Patrons whose rights arise *ex-officio*, or are held as a public trust, cannot avail themselves of the Act [4].

(iv) *On improper dealings with copyholds.* It is a survival Copyholds.

[1] 7 & 8 Geo. IV. (1827) c. 25. [2] 9 Geo. IV. c. 94.
[3] The Act (§ 1) says 'one or'; but this must be a misprint.
[4] 9 Geo. IV. (1828) c. 94. § 6.

of the ancient principles of tenure, which clings to copyholds after it has practically disappeared from other tenures, that any act of the tenant which, either expressly or by implication, denies his lord's title, is an occasion of forfeiture. Thus Waste, voluntary or permissive, works a forfeiture; because it virtually asserts the right of the copyholder in a manner inconsistent with his lord's title. And, as we have seen [1], the Law of Waste is stricter in respect of a copyholder, than in respect of a socage tenant for life, or a tenant for years. A lease without licence by a common law assurance for any term longer than a year is a cause of forfeiture; formerly a feoffment had a similar effect [2]. So also is a wilful refusal on the part of the copyholder to render his dues and services after sufficient notice; but a mere failure through inability is not [3]. Wilful confusion of boundaries is also an occasion of forfeiture; but the lord cannot obtain assistance from the High Court to remedy the confusion, except upon the terms of waiving the forfeiture [4].

In the case of copyholds, the High Court will not give relief against a forfeiture legally incurred [5], unless the lord has another remedy [6], or unless it is satisfied that the wrong-doing of the tenant arose through inadvertence [7], or at least that pecuniary compensation can be made to the lord for any loss which he may have suffered [8].

[1] Ante, p. 61.

[2] Owing to the facts that a feoffment has no longer any tortious operation (8 & 9 Vict. (1845) c. 106. § 4), that Fines and Recoveries are abolished (3 & 4 Will. IV. (1833) c. 74. § 2), and that bargains and sales and grants have always been 'innocent' conveyances, a demise for years appears to be the only process by which a copyholder can alienate to his lord's prejudice. The term is valid as against all persons but the lord (*Tresidder* v. *Tresidder* (1841) 1 Q. B. 416); and is, therefore, a cause of forfeiture to him.

[3] *Willowe's* Case (1608) 13 Rep. 1.

[4] *Bishop of Durham* v. *Rippon* (1826) 4 L. J. Ch. 32.

[5] *Peachy* v. *Duke of Somerset* (1721) 1 Strange, 447; *Hill* v. *Barclay* (1811) 18 Ves. Jr. at p. 64.

[6] *Paston* v. *Utbert* (1629) Litt. at p. 267.

[7] *Cox* v. *Higford* (1710) 2 Vern. 664; *Nash* v. *Earl of Derby* (1705) 2 Vern. 537.

[8] *Thomas* v. *Porter* (1668) 1 Ch. Ca. 95.

Enforcement of copyhold forfeitures.

The ordinary method of enforcing a forfeiture is by an action in the nature of ejectment; but the customs of many manors require preliminary formalities to be observed in the manorial courts. Where such formalities are prescribed, they must be strictly observed; for the law regards forfeitures with dislike, and will only sanction them when the rights of the claimant are beyond criticism [1]. Moreover, no one has a right to claim a forfeiture unless he was lord at the time when the forfeiture was incurred [2]. And any unequivocal recognition of the tenant by the lord who knows that a forfeiture has been committed, is a waiver of the forfeiture [3]; unless perhaps where the act which occasioned the forfeiture actually destroyed the copyholder's estate [4].

Forfeiture for breach of express condition.

We now come to the cases in which forfeiture is claimed upon breach of an express condition. The nature of conditional estates, and the persons who are entitled to take advantage of the breach of conditions, are subjects which have been previously discussed [5]. There is, moreover, little to be said with regard to the methods of enforcing forfeitures for breach of express condition, the normal procedure being by action in the nature of ejectment. Here it will be necessary, therefore, merely to deal with the important subject of relief against forfeitures.

Relief against forfeitures.

With regard to this point, it has long been established, that where the object of the condition is, in the view of the Court, to secure the payment of money, the mere neglect to satisfy the condition according to its literal terms will not incur an irremediable forfeiture [6]. In a court of Law, no doubt, the defaulting party would, until recent times, have had no remedy; but a court of Equity would have given relief. It is sometimes stated to be doubtful, whether the rule applies to conditions precedent as well as to conditions subsequent; but the distinction has been denied, both in theory and

[1] *Tarrant* v. *Hellier* (1789) 3 T. R. at p. 170.
[2] ib. at p. 162.
[3] ib.
[4] Coke, *Copyholder*, Suppl. sect. xi.
[5] Ante, pp. 177–84.
[6] *Hayward* v. *Angell* (1683) 1 Vern. 222.

practice, by judicial opinion[1]. On the other hand, if the object of a condition be, in the opinion of the Court, to ensure the performance of some collateral act, not readily capable of being estimated at a money value, no relief will, in the absence of express legislation, be given, unless the act desired is immoral or impolitic[2]. This being the general theory, it will be well to mention the principal cases in which it has been applied.

Non-payment of rent.

(i) *Non-payment of rent.* It was long ago established, that a court of Equity would relieve a lessee against a forfeiture of his estate for non-payment of rent, where it appeared that such non-payment arose from inadvertence or mere negligence. In fact, courts of Equity were so lenient in this case, that it was found necessary to forbid by statute the granting of relief, unless it was applied for within six months after execution in ejectment[3]; and the statute includes leases for lives as well as for years. The power to grant relief, in this restricted form, was extended to common law courts by the Common Law Procedure Act, 1860[4]; but the restriction remains unaltered by recent legislation[5].

Non-performance of other conditions.

(ii) *Non-performance of other conditions contained in leases.* A comprehensive section of the Conveyancing Act, 1881[6], has now laid it down that no lessor shall proceed to enforce a condition for forfeiture or re-entry upon breach of any covenant or condition, until he has given the lessee notice of the breach of which he complains, and the lessee has failed, within a reasonable time, to remedy the breach (if it is capable of remedy) and, in any case, to tender compensation. If, after such notice, he finds it necessary to take proceedings, the Court may then grant or refuse relief to the lessee, as it thinks fit,

[1] *Hayward* v. *Angell* (1683) 1 Vern. at p. 223; *Wallis* v. *Crimes* (1667) Ca. in Chr. 89; *Bland* v. *Middleton* (1679) 2 Cha. Ca. 1.

[2] *Cary* v. *Bertie* (1697) 2 Vern. 333.

[3] 4 Geo. II. (1730) c. 28. § 2.

[4] 23 & 24 Vict. c. 126. §§ 1, 3. The judge must direct a minute of the relief to be endorsed on the lease.

[5] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 14 (8). [6] ib. § 14.

and, if it grants relief, may impose such terms as it deems right. This section, which appears to throw an unenviable amount of responsibility upon the Court, extends to grants at fee-farm rent[1], and to grants securing rent upon condition. The relief contemplated by it can, it seems, only be granted if the tenant applies before the lessor has actually and legally re-entered[2]. On the other hand, the statute is retrospective and cannot be excluded by agreement of the parties[3]. The terms of the Act of 1881 do not permit of the granting of relief in cases of forfeiture incurred by breach of covenant against assigning or parting with the lessee's interest, or by the bankruptcy of the lessee, or by his suffering execution to be levied upon the demised premises[4]. But the operation of this restriction is postponed by the amending Act of 1892[5], to the expiry of one year from the event which occasioned the forfeiture, so that the lessee's interest can in the interval be disposed of. Moreover, the Act of 1892 empowers the Court to grant relief to an underlessee who applies for relief against a forfeiture occasioned by the fault of the original lessee, and enables it to vest the premises directly in the underlessee, for the residue of the latter's term, upon such conditions as it may think fit[6]. Relief can be given to the underlessee in a case in which the original lessee would be excluded, e. g. where the original lessee has become bankrupt[7]. But it will not be given where the underlessee has himself been guilty of negligence[8].

Apart from these special provisions, relief may of course be given by the Court on special grounds, e. g. fraud, accident, mistake, duress, and the like, against the consequences of the

Equitable grounds of relief.

[1] i. e. alienations in fee simple reserving rent in perpetuity.

[2] *Quilter* v. *Mapleson* (1882) 9 Q. B. D. 672 (Lindley, J., at p. 676).

[3] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 14 (9).

[4] ib. § 14 (6).

[5] 55 & 56 Vict. c. 13. § 2. But this relaxation does not extend to leases of agricultural or mining land, to public houses, to furnished dwelling-houses, or to any property with respect to which the personal qualifications of the tenant are important.

[6] ib. § 4.

[7] *Wardens of Cholmeley School* v. *Sewell*, 1894, 2 Q. B. 906.

[8] *Imray* v. *Oakshette*, 1897, 2 Q. B. 218.

non-performance of a condition. But these topics belong to the general principles of Equity, and are not specially confined to land law [1].

The subjects of the waiver of forfeitures and the effects of forfeitures when enforced have been discussed in a previous chapter [2].

[1] For a good discussion of the nature and limits of this relief (which can now, of course, be given by all branches of the High Court), see *Barrow* v. *Isaacs & Son*, 1891, 1 Q. B. 417.

[2] Ante, cap. x.

CHAPTER XIV.

3. OCCUPATION AND PRESCRIPTION.

Long exercise of rights.

THE title which we are to discuss in this chapter depends upon the principle, that long continued enjoyment of proprietary rights must be protected, even though the enjoyment were originally commenced without lawful authority. Every civilized system of law recognizes this principle; but the precise application differs in various countries.

It may, indeed, well be questioned how far title by occupation properly falls within the list of Acquisitions by Operation of Law. It may be said that the acquirer, at least, is conscious of taking a step which, if not interrupted, will set the law in motion, even though the other party may not be aware that he is losing his interest. But the question, though academically interesting, is not of great importance.

In treating of acquisition by long continued enjoyment, we must at the outset distinguish between (*a*) the kinds of subject-matter which may be so acquired, and (*b*) the principles upon which the acquisition proceeds. The former distinction is realized by reverting to the old division of hereditaments into corporeal and incorporeal. The rules which govern the acquisition of corporeal hereditaments by occupation, differ from those which regulate the acquisition of incorporeal hereditaments by prescription and custom. The latter distinction is based upon a very important but often forgotten difference between *positive* and *negative* titles. Thus, the law may declare positively that a certain event constitutes *A* owner of a particular interest. This is the ordinary title, by

Corporeal and incorporeal hereditaments.

Positive and negative titles.

inheritance, purchase, &c. Or, the law may proceed in another way, and declare that, after a certain period, no proceedings may be taken by *B* to recover an interest which *A* is enjoying, but which may, up to the end of that period, have legally belonged to *B*. If *B* is the only person likely to claim the interest in question, this declaration virtually amounts to a recognition of *A*'s enjoyment. But it does not constitute *A owner*; nor will it do so, even if the law go on expressly to extinguish *B*'s rights. *A*'s title is merely negative, at any rate in theory. It is necessary to bear both these distinctions in mind in approaching our subject.

Corporeal hereditaments.

First, then, as regards corporeal hereditaments. So far as concerns positive title to these by enjoyment or possession, without other right, the instances appear to be limited to the two cases of the estate *pur auter vie*, and the alluvion of soil. In the former instance, general occupancy has, as we have seen, been abolished by statute[1]; so-called 'special occupancy' is, virtually, not occupancy at all, but acquisition under a conveyance. If *A* convey to *B* and his heirs, to hold during the life of *C*, and *B* die in *C*'s lifetime, whereby *B*'s heir succeeds as special occupant, nothing but a rigid and somewhat pedantic adherence to the technical definition of heirship could prevent it being said that *B*'s heir inherited by virtue of the conveyance to *B*.

Special occupancy.

Alluvion.

As respects the claim by alluvion, it seems to be recognized as the rule of English law, that a gradual silting up of soil, either from the bed of a river or from the sea, gives a title by occupancy to the owner of the land to which the accretion is made[2]. And it is said by Bracton[3], though the rule is questioned by Blackstone[4], that an island arising in a river belongs to the adjacent riparian owners in proportion as the island subtends their respective boundaries, and is on their

[1] 29 Car. II. (1677) c. 3. § 12; 14 Geo. II. (1740) c. 20. § 9.

[2] See the doctrine recently applied in *Hindson* v. *Ashby*, 1896, 1 Ch. 78, reversed on appeal (1896, 2 Ch. 1), but mainly on the facts. As to the sea, cases quoted by Dyer, 326 b.

[3] Lib. II. cap. 2.

[4] *Comm.* (4th ed.), II. 261.

respective sides of the *medium filum*. But a sudden changing of a river course does not effect a change of ownership; and a sudden dereliction of the sea gives the newly uncovered land to the Crown, as owner of the soil below high-water-mark [1].

But, although these appear to be the only two cases in which a *positive* title to corporeal hereditaments can be acquired by occupation, there is a very important method by which a negative or *de facto* title can be acquired. This is by means of the Statutes of Limitation.

Limitation of actions.

The history of this branch of the law is interesting, but beyond the scope of this work. It is sufficient to say that, while English law could not, till quite lately, bring itself to say that actual ownership (*jus*) could be lost by neglect to enforce it, yet the principle of denying the use of legal remedies to a man who slept upon his rights has long been recognized. Owing to the variety of remedies open to a dispossessed claimant by the old law, there was much anomaly and discrepancy in the subject. But the first great attempt made to simplify the forms of process, was accompanied by a definite fixing of the period within which claims against lands could be enforced. This was the Real Property Limitation Act, 1833 [2], which, though altered in important particulars, still remains the foundation of the law on the subject. By that statute [3], as amended by an Act of 1874 [4], it is provided that no entry, distress, or action shall be brought to recover any land or rent but within twelve years after the right to bring the same shall have accrued to the person seeking to enforce it, or the person through whom he claims. Due provision is made by the Acts for exceptional cases. Thus, a remainderman or reversioner is not obliged to take advantage of a for-

[1] Blackstone, *Comm.* (4th ed.), II. 262. See, on the whole subject of marine accretions, *Rex* v. *Yarborough* (1828) 1 Dow. & Cl. 178, and *Hull & Selby Railway* (1839) 5 M. & W. 327. It seems to be admitted, that potential rights of acquisition in respect of derelictions can be acquired by manorial owners of lands adjoining the sea shore. Case of *the Barons of Berkeley* (1638) reported in Hall on *The Sea Shore*, ed. Moore, p. 308.

[2] 3 & 4 Will. IV. c. 27. [3] § 2. [4] 37 & 38 Vict. c. 57. § 1.

Remainder-men and reversers.

feiture; and his period will not begin to run until the natural determination of the particular estate. But, if the particular tenant has been dispossessed, the period of the remainderman or reversioner is limited to twelve years from the dispossession *or* to six years from the expiry of the particular estate, whichever is longest[1].

Disabilities.

Persons under disability have a similar period of six years from the removal of the disability; with an extreme limit of thirty years from the happening of the cause of action[2].

Ecclesiastical corporations.

Ecclesiastical corporations sole may enforce their claims within six years from the appointment of the incumbent next but one after that incumbent in whose term of office the right accrued; or, if this period does not cover sixty years, then within an absolute period of sixty years from the accrual of the right[3].

Advowsons.

Persons seeking to recover advowsons must proceed before the expiry of three adverse incumbencies, or a period of sixty years from the first appointment hostile to their claims, whichever is longest; with an extreme limit of 100 years from the first hostile appointment[4].

Absence beyond seas is no longer a disability; and it is assumed that, as respects property to which the Married Women's Property Acts apply, the disability of coverture ceases to apply from the passing of the Act which first rendered the property in question separate property[5].

Trusts.

Even an express trust will not enlarge the period of limitation, in respect of moneys charged on land[6]. In the case of periodical payments of income

[1] 3 & 4 Will. IV. (1833) c. 27. § 4; 37 & 38 Vict. (1874) c. 57. § 2. The final clause of this last section appears to render it possible for a subsequent remainderman to be barred before he has had a chance of enforcing his claims. Thus, grant to *A* for life, remainder to *B* for life, remainder to *C* in fee. *A* abandons possession, *B* does nothing for six years after *A*'s death. *C* is barred. (But the clause is obscure.)

[2] 3 & 4 Will. IV. (1833) c. 27. §§ 16, 17; repealed and replaced by 37 & 38 Vict. (1874) c. 57. §§ 3, 5.

[3] This appears to be the effect of section 29 of the Act of 1833; but the literal words permit of very curious interpretations.

[4] 3 & 4 Will. IV. (1833) c. 27. §§ 29, 33.

[5] 37 & 38 Vict. (1874) c. 57. § 4.

[6] ib. § 10. But this section should be read in connection with section 25 of the Act of 1833, section 25 (2) of the Judicature Act, 1873 (36

arising from land, it is expressly provided that no more than six years' arrears can be recovered; but if the failure to recover the arrears has been due to the existence of a prior incumbrancer, the claimant may take proceedings within one year from the removal of the incumbrance [1]. Arrears of incomings.

The chief difficulty which arises on the construction of the Statutes of Limitation is, usually, to determine the precise date at which the period of limitation began to run. The principle is, that from the moment at which the claimant, or the person through whom he claims, might have taken proceedings to enforce his claim to the land or income, the period begins to run against him. The period is not broken by the death of the claimant, nor by the alienation of his rights; the person on whom his right devolves will take it subject to it being barred at the expiry of the original period. And even if the latter should be a person under disability, the period will not be suspended, if it has once begun to run [2]. But an acknowledgement in writing, by a person in possession, of the title of the claimant, given to the claimant or his agent, breaks the period of limitation and starts it afresh [3]. Such acknowledgement must, however, be given before the period of limitation has expired [4]. These explanations still leave certain cases of exceptional difficulty, for which express provision is made by the Statutes. When does the period commence?

(i) *The case of a tenancy at will.* Here it is, obviously, difficult to determine when the right of the landlord to claim possession accrues. In strictness, of course, it arises at the moment when the tenant takes possession; but to hold that it did so for the purposes of limitation would be to render the Tenancy at will.

& 37 Vict. c. 66), and sections 1 and 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59).

[1] 3 & 4 Will. IV. (1833) c. 27. §§ 41, 42. When the remedy is barred against the land, it is barred also against the person who created the charge (*Fearnside* v. *Flint* (1883) 22 Ch. D. 579; *Sutton* v. *Sutton* (1882) 22 Ch. D. 511), but not against a stranger, e.g. a surety, who is bound by specialty (*Re Powers* (1885) 30 Ch. D. 291).

[2] *Goodall* v. *Skerratt* (1855) 3 Drew. 216.

[3] 3 & 4 Will. IV. (1833) c. 27. § 14. [4] *Re Alison* (1879) 11 Ch. D. 285.

tenancy nugatory. Presumably, tenancies are not made to be put an end to at once. So the statute of 1833[1] fixes the expiry of one year from the commencement of the tenancy, as an arbitrary point at which the period of limitation shall commence. The result is, that owners of cottages who allow old servants to occupy them rent free, often find that their pensioners have acquired a legal title as against them; for pensioners are proverbially long lived. Of course the actual payment of a merely nominal rent will bar the statute[2]; and a distinct termination of the tenancy, even though followed by a fresh occupation by the same tenant, will have the same effect[3].

Oral tenancies.

(ii) *The case of an oral tenancy for a fixed period.* The difficulty in this case seems to arise from the affection of the law for the peculiar tenancy known as the tenancy 'from year to year,' formerly described[4]. We have seen that the most important feature of this tenancy is the uncertainty of its duration, owing to the rules of law on the subject of notice. And, as an oral tenancy cannot lawfully be created for a period of more than three years from the making[5], the tendency of the law to presume tenancies from year to year often leads to the recognition of what is really an unintended arrangement between the parties. In these cases, as well as in those in which the parties originally intend a tenancy from year to year, the statute provides, that the period of limitation shall begin to run either from the expiry of the first year of the tenancy, or from the last receipt of rent by the landlord, whichever shall last happen[6].

Purchases from trustees.

(iii) *The case of claims against a purchaser from an express trustee.* We have seen[7] that, in favour of an express trustee, the Statute of Limitations does not run, except in cases

[1] 3 & 4 Will. IV. c. 27. § 7.

[2] *Hodgson* v. *Hooper* (1860) 29 L. J. (N. S.) Q. B. 222.

[3] ib. But the intention to determine must be clear (*Lynes* v. *Snaith*, 1899, 1 Q. B. 486).

[4] Ante, pp. 88–9.

[5] Statute of Frauds, 1677 (29 Car. II. c. 3), §§ 1, 2.

[6] 3 & 4 Will. IV. (1833) c. 27. § 8.

[7] Ante, p. 232.

provided for by the Trustee Act, 1888[1]. But it runs in favour of purchasers from trustees, and *a fortiori*, in favour of purchasers from them. If a purchaser for value acquire from a trustee the legal estate, in *bona fide* ignorance of the existence of the trust, he of course acquires an indefeasible title at once, i. e. a title which the beneficiaries cannot upset on the ground that the sale by the trustees was a breach of trust[2]. But, if he should not acquire the legal estate, or if he should be affected with notice of the trust, then his position is by no means secure. And it is in such cases that he needs the protection of the statute. But it would be very hard on the *cestui que trust* to make the period run against him so long as the trustee did his duty; for the possession of the trustee is the possession of the *cestui que trust*, and the latter has not even a technical right to demand possession from the trustee, though, doubtless, he has a right to the due performance of the trust. So the statute fixes upon the sale by the trustee as an unequivocal denial of the latter's fiduciary position, and, consequently, as the commencement of a possession adverse to the *cestui que trust*[3]. From this point, therefore, the period begins to run in favour of the purchaser against the *cestui que trust*, even though the latter were ignorant of the sale. And a charity will be barred under this rule[4].

Effect of statutory bar.

Now comes the important question, what is the effect of the expiration of the period of limitation?

Against the former owner.

So far as concerns the rights of the person *against* whom it has run, i. e. the person whose right to bring the action is barred by the statute, the position is quite clear. Whatever may have been his position before the passing of the Act of 1833[5], the 34th section of that statute has determined that the expiry of the period not only bars his remedy, but

[1] 51 & 52 Vict. c. 59. §§ 1, 8.
[2] Ante, pp. 142-3.
[3] 3 & 4 Will. IV. (1833) c. 27. § 25.
[4] *President &c. of Magdalen, Oxford*, v. *Attorney-General* (1857) 6 H. L. C. 189.
[5] 3 & 4 Will. IV. c. 27. § 34.

extinguishes his title. It is for this reason that a subsequent acknowledgement of title is ineffectual to revive a barred right. Unfortunately, owing to the wording of the 8th section of the statute, there appears to be some doubt whether a subsequent payment of rent does not operate to revive a title which has been extinguished by the Act[1].

In favour of the possessor.

But, as to the position of the person in whose favour the statute has run, the law is by no means so clear. In fact, some of the questions arising out of the situation seem to be almost insoluble. To take the simplest case. Suppose *A*, originally a mere trespasser, to remain for twelve years in undisturbed possession of a piece of land. What is his position? It is commonly said that he has a 'good possessory title,' or a 'parliamentary title'[2]. And courts of Equity have even gone so far as to force a title of that kind upon an unwilling purchaser[3]. But the justice of these decisions seems to be very doubtful. Suppose the person against whom *A* acquired possession to be a person under disability. What is there to prevent him ejecting the purchaser at any time within thirty years from his dispossession? Suppose him to be a lessee for a long term at a small rent, which he has gone on paying, though not in possession of the land. Such a position is by no means impossible. It is easy to imagine a builder taking a lease, or an agreement for a lease, of a large area at a single rent. So long as the lessee paid the rent and performed the covenants, the lessor would have no right to possession; or, at least, he could not discover that his lessee was allowing the statute to run against him in respect of a particular piece of land. It would be monstrous,

[1] *Bunting* v. *Sargent* (1879) 13 Ch. D. 330; but considerable doubt is thrown upon this decision by the terms of the judgement in the later case of *Sanders* v. *Sanders* (1881) 19 Ch. D. 374.

[2] *Jukes* v. *Sumner* (1845) 14 M. & W. 39; *Re Alison* (1879) 11 Ch. D. pp. 295, 297.

[3] *Scott* v. *Nixon* (1843) 3 Dr. & W. 388; *Sands to Thompson* (1883) 22 Ch. D. 614. In *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219, it was not strictly necessary to decide the point, as the person in possession derived title from another source.

in these circumstances, to allow a stranger to obtain an unincumbered fee simple as against the lessor; and yet it might be very difficult to argue that he had only acquired the leasehold interest[1].

Portions of statutory period.

But the case becomes infinitely more difficult, when the adverse possessor has only held possession for a time short of the statutory period. What is the position of *A*, who has occupied, without acknowledgement, for six years, land which unquestionably belongs to *X*? As against *X*, *A* has not a shadow of right; he is in the same legal position as when he first entered, except that trespass cannot be brought against him. As against strangers, he enjoys the privilege which always belongs to a defendant, that of putting his opponent to prove his case. Suppose *A* to die, is his heir or devisee entitled to eject a stranger who, hearing of *A*'s death, has taken peaceful possession?[2] On what title could the action be brought? Or suppose successive acquisitions, for short periods, by persons totally unconnected with one another. Is the title to be vested in that fortunate person who happens to be in possession at the precise moment at which the right of the former owner is extinguished? These examples will serve to show the complexity of the questions left outstanding by the Statutes of Limitation. They cannot be further discussed here.

Incorporeal hereditaments.

Turning now from corporeal hereditaments, we proceed to examine the case of incorporeal hereditaments, including under the latter term only 'hereditaments purely incorporeal[3].' For it is, of course, manifestly impossible to obtain possession of, and, consequently, a title by possession to estates *in futuro*. The only instance in which such a claim could be urged is the case of a reversion, which might be claimed by perception of rent. But, in this case, it seems highly probable that the

[1] *Tickborne* v. *Weir* (1893) 67 L. T. 735.

[2] *Asher* v. *Whitlock* (1865) L. R. 1 Q. B. 1; *Carter* v. *Barnard* (1849) 13 Q. B. 945. Contra, *Dixon* v. *Gayfere* (1853) 17 Beav. 421.

[3] Williams, *Real Property*, part ii. cap. v.

victory would lie with the tenant, the actual occupier of the land, who, if his landlord had received no rent or acknowledgement from him for the statutory period, would be able to resist an action by him for possession; while the recipient of the rent would find it somewhat difficult, as we shall see, to establish any claim against the occupant.

Prescription and custom.

In the case of 'hereditaments purely incorporeal,' however, it has long been the law, that a title to these may be established, by the mere proof of long continued user—not of possession, for there can be, *ex hypothesi*, no possession of an incorporeal hereditament. But the claim by long user, which, of course, must always raise the presumption of a lawful origin, could formerly have been asserted on two grounds, viz. prescription and custom[1], and the distinction remains unaltered by recent legislation. A claim by prescription was, before the passing of the Prescription Act, 1832, always founded on the hypothesis, that the right claimed had actually been granted in time gone by to the predecessors in title or the ancestors of the claimant, and that the grant had been inadvertently lost. This hypothesis, which was evolved by judges and writers, to justify the protection of rights which had been long exercised without question, but for which no express title could be shown, was entirely in harmony with the theory of the old law, which treated a grant, a mere private conveyance, as an infinitely less effective assurance than the open livery of seisin which was required to convey corporeal hereditaments. But, unhappily, the theory of a lost grant, if rigidly applied, frequently broke down in the face of the ingenious criticism of hostile counsel. Any flaw in the fictitious story told by the claimant was sure to be detected, and then his whole claim vanished. Thus, if a man claimed that from time immemorial he and his

Theory of the 'lost grant.'

[1] It is, perhaps, technically incorrect to speak of a right acquired by custom as an 'incorporeal hereditament.' It cannot, for example, be treated as property, in the sense of being sold or devised. But the similarity of character renders it convenient to follow the practice of treating prescription and custom together.

predecessors in Blackacre had been entitled by reason of a lost grant to a way over Whiteacre, his opponent could defeat him at once, by showing that, a century before, Blackacre and Whiteacre had belonged to the same owner. For a man could not have made a grant to himself. To remedy technical difficulties of this kind, and to place the law of prescription on a satisfactory basis, the Prescription Act of 1832 was passed.

Custom.

On the other hand, if a man claimed by custom, he alleged no grant, nor even express title by reason of blood or estate. He merely asserted that, by the immemorial custom of a particular locality, the class of persons to which he belonged had exercised certain rights, and that, by virtue of the rules of English law, such a custom, inasmuch as it complied with certain well-known requirements, had the effect of law[1]. Such an assertion was, of course, infinitely easier to prove, than an allegation which required the investigation of at least two titles for a very lengthy period, especially as the rules of evidence allowed the presumption of immemorial user to be raised on easy terms. And so, as we shall see, the courts have established one or two rather severe rules upon the subject of claims by custom, which go far to limit their frequency.

We deal first with the subject of Prescription.

Prescription.

Prescription may be defined, now that the fiction of a lost grant has been abolished, as the claim to exercise a specified right[2] by reason of the fact that the claimant and his ancestors, or the claimant and his predecessors in title, or any one of these, have or has exercised the right for a period varying

[1] On the distinction between prescription and custom, see the classical passage in Co. Litt. 113 b.

[2] A most unfortunate decision (*Shuttleworth* v. *Le Fleming* (1865) 19 C. B. (N. S.) 687) has given rise to the view that prescriptive claims to profits in gross are not within the Prescription Act. It is to be hoped that a Court of Appeal will some day hold that *Shuttleworth* v. *Le Fleming* went on the ground that what the defendant really claimed was a corporeal hereditament.

Claims of appendancy and appurtenancy.

with the nature of the right claimed. It is obvious that, by a claim founded on the exercise of a right by himself and his predecessors in title, the claimant can only establish a right appendant or appurtenant to the land in respect of which he claims. And the right, if successfully established, will, in the future pass along with the land in question, unless expressly severed from it. And the same will, no doubt, be the result if, under the shortened period of the Prescription Act, the claimant founds on his own user only, but in respect of his occupation of a particular piece of land. But if he claims by reason of the user of himself personally, or of himself and his ancestors, the right will be *in gross*[1]. It was said, however, under the old law, that such a right would, if not alienated, descend only to the blood of the line of ancestors in whose names it was prescribed for[2]; and it is possible that a similar result will follow from the fourth section of the Inheritance Act, 1833[3].

Claims in gross.

Nature of user.

The user upon which a claim by prescription is founded must have been continuous and peaceable. But the mere suspension of actual exercise, in a manner which raises no presumption of abandonment, will not destroy the claim[4]; and it is expressly provided by the Prescription Act[5], that an interruption in exercise shall not be deemed to be such unless it is acquiesced in for one year after the party interrupted shall have notice of it. The exercise must, of course, be as 'of right[6],' i. e. not secret, or permissive, or fraudulent. And the decisions go far to show that there cannot be an exercise

[1] Blackstone, *Comm.* (4th ed.), II. 265. Whether or not claims to profits in gross are within the Prescription Act (see last note), it is certain that they can be prescribed for. *Welcome* v. *Upton* (1840) 6 M. & W. 536.

[2] Blackstone, *Comm.* (4th ed.), II. 266.

[3] 3 & 4 Will. IV. c. 106. The difficulty is, that the claimant who acquires by prescription does not acquire by purchase (Blackstone, *Comm.* 4th ed., II. 266); while the Inheritance Act only speaks of a man acquiring by purchase.

[4] *Carr* v. *Foster* (1842) 3 Q. B. 581, approved in *Hollins* v. *Verney* (1884) 13 Q. B. D. 304.

[5] 2 & 3 Will. IV. (1832) c. 71. § 4.

[6] ib. §§ 1, 2.

as 'of right,' when there is no person capable of or interested in opposing it[1]. But this restriction does not apply to claims of light, which rest upon actual enjoyment, except in the single case of an enjoyment arising out of written agreement[2]. The claim to the enjoyment of light is also exceptional, on another ground. It does not bind the Crown; for, before the passing of the Prescription Act, no presumption of a lost grant would have been made against the Crown, and there is nothing in the section which refers to lights to alter this rule[3]. But other claims under the statute are expressly declared to bind the Crown[4].

It was formerly also a rule, that no claim by prescription could be set up in favour of any one but the tenant in fee simple of the dominant tenement[5]. Although this rule virtually made no difference, it being always possible for the claimant to claim on behalf of the tenant in fee, it was open to abuse. For the tenant in fee might collude with the owner of the servient tenement to repudiate the claim. And so it is expressly enacted by the Prescription Act[6], that it shall no longer be necessary to claim in the name of the tenant in fee. On the other hand, it has recently been laid down, that where a claim cannot be established *against* the owner of an alleged servient tenement, it cannot be established against his tenant[7].

Period of prescription.

So far the rules on the subject of prescription apply, with the exceptions noted, to all cases, whatever the nature of the right claimed. It is when we come to state the length of the period of exercise which will suffice to found a claim, that we find serious differences. It is, unfortunately, necessary to

[1] *Webb* v. *Bird* (1861) 10 C. B. (N. S.) 268; *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852.

[2] 2 & 3 Will. IV. (1832) c. 71. § 43. See *Jordeson* v. *Sutton Gas Co.* 1898, 2 Ch. 614.

[3] *Wheaton* v. *Maple & Co.* 1893, 3 Ch. 48.

[4] 2 & 3 Will. IV. (1832) c. 71. §§ 1, 2.

[5] *Foiston* v. *Crachwoode* (1587) 4 Rep. 31b.

[6] 2 & 3 Will. IV. (1832) c. 71. § 5.

[7] *Wheaton* v. *Maple & Co.* 1893, 3 Ch. 48.

admit that there are five distinct groups of incorporeal hereditaments, if we classify them according to the periods of prescription upon which they can be claimed.

Profits. (i) *Profits à prendre* (other than tithes, rents, and services). It is provided by the Prescription Act, 1832 [1], that a claim to a *profit à prendre*, founded on an exercise of thirty years immediately preceding the claim, shall not be defeated merely by proof of commencement prior to that period; and that, after a similar period of sixty years, the claim shall *only* be defeated by proof that it was had by virtue of express written agreement.

Easements. (ii) *Easements* (other than lights enjoyed in respect of a building). Here the rule is precisely the same as in the last case, except that the periods of twenty and forty years are substituted for the periods of thirty and sixty years respectively [2].

Lights. (iii) *Lights enjoyed in respect of a building.* Here, after actual user for twenty years, the right is indefeasible (except as against the Crown) otherwise than by showing exercise by virtue of express written agreement [3].

Tithe (iv) *Tithes.* Tithe is due of common right; therefore no prescription is necessary to raise a claim to it in the ordinary way [4]. But it may be very important to claim exemption from tithe, or what is called a *modus*, i. e. a composition fixing the amount at something different from that ordinarily claimable. And, as the law formerly stood, this was very difficult to do. But now, by a statute [5] passed in the same year with the Prescription Act, 1832, any such claim, when made in response to a demand for tithe by any person or body other than a corporation sole, may be *prima facie* established by a proof of exemption or *modus* for thirty years next

[1] 2 & 3 Will. IV. c. 71. § 1. [2] ib. § 2. [3] ib. § 3.

[4] It is probable that a parson may claim tithes by prescription outside his own parish (Y. B. 14 Hen. IV. (1413) H. pl. 14. fo. 17). But his claim would be governed by the common law, the Acts of 1832 not applying to such a case.

[5] 2 & 3 Will. IV. c. 100. § 1.

preceding the demand; i.e. the claim cannot be defeated merely by showing that the exemption or the payment of the *modus* commenced before that time. And, on proof of such exemption or payment for sixty years immediately preceding the demand, the claim will be indefeasible, unless it be proved that the practice on which it is founded arose by virtue of express written agreement. Where the demand of tithe is made by a corporation sole, spiritual or temporal, then the practice relied upon must be shown to have continued during the whole of two incumbencies, and three years from the appointment and institution or induction of a third incumbent. But if the two incumbencies do not cover a period of sixty years, then the claimant must prove the practice to have existed for a period of sixty years covering such two incumbencies, with the addition of the three years before mentioned. Even then the claim may be defeated, by proof that it arose by virtue of express written agreement.

Saving for disabilities.

In all these four cases, it is expressly provided [1] that the time during which the person entitled to resist the claim in question shall have been a tenant for life, or a person under any disability, or during which 'any' action or suit shall have been diligently prosecuted, shall be excluded in reckoning the period of prescription, except only when the lapse of the period renders the claim indefeasible [1]. And, in the cases of claims by prescription to rights of way and watercourse, when the servient tenement has been held for term of life, or for any period longer than three years, the length of the term is to be excluded in reckoning the prescription period of forty years, if the reversioner shall resist the claim within three years after the determination of the term [2]. Finally, in the case of a claim to *modus*, or exemption from tithe, any period is to be excluded during which the

[1] 2 & 3 Will. IV. (1832) c. 71. § 7; 2 & 3 Will. IV. (1832) c. 100. § 6. Questions as to disability could not, it would seem, arise in the discussion of common law claims by prescription.

[2] 2 & 3 Will. IV. (1832) c. 71. § 8. Apparently, a remainderman is not protected.

lands in respect of which exemption or *modus* is claimed were held or occupied by the person entitled to the tithes [1].

Rents and services.

(v) *Rents and Services.* It seems almost incredible that there should be any doubt at the present day whether rents and services can be claimed by prescription. Of course, where they are derived from a tenant for years, they are looked upon as part of a corporeal hereditament, and, as such, cannot be prescribed for. And it is equally clear that they are excluded from the benefits of the Prescription Act [2]. But, suppose a rent to have been paid from time immemorial by the successive holders of Blackacre to a particular corporation, or to the tenants of Whiteacre; are the recipients of the rent without remedy if payment is refused? In the great majority of cases they will not be able to show any express title. And yet the utmost that can be said is, that there are some scanty traces of authority [3] for the assertion that such a claim could be established by prescription. But, of course, the claimant would have to satisfy the requirements of the law as it stood before the passing of the Prescription Act [4], which does not, be it observed, abrogate the old law, except so far as it is inconsistent with its express provisions.

Liabilities by prescription.

It is often said that a liability, as well as a right, may be acquired by prescription [5]; and the instances usually quoted are those of liability to repair breaches in fences and sea walls [6]. But every right acquired by prescription implies a corresponding liability similarly acquired. The only special feature in the cases last referred to is, that in them the liability of the owner of the servient tenement is positive, i. e. to do something

[1] 2 & 3 Will. IV. (1832) c. 100. § 5.

[2] 2 & 3 Will IV. (1832) c. 71. § 1.

[3] Y. B. 35 Hen. VI. (1456) M. pl. 10, fo. 6; *Abp. of Dublin* v. *Trimleston* (1842) 2 Dr. & W. 535. Coke asserts generally (Co. Litt. 144 a), that a rent can be prescribed for; but he quotes very little authority.

[4] 2 & 3 Will. IV. (1832) c. 71.

[5] Stephen, *Comm.* 12th ed., I. 633; Shelford, *Real property Statutes*, 9th ed., p. 26.

[6] *Reg.* v. *Leigh* (1839) 10 A. & E. 398; *Reg.* v. *Commissioners of Sewers for Fobbing* (1886) 11 App. Ca. 449.

for the benefit of the dominant tenement; while in the vast majority of cases it is negative, i. e. to abstain from doing something.

Claims by custom stand on a different footing, in many respects, from those by prescription, though both are founded on proof of long continued user. Custom.

In the first place, a claim by custom does not, and never did, suppose a lost grant; and, therefore, it can be raised by or on behalf of persons who could not claim by prescription. For a grant can only be made to a determinate person or persons, natural or corporate; a mere indeterminate body, such as 'the inhabitants' of a village, cannot take by grant[1]. But they can claim by custom[2]. On the other hand, a not unreasonable fear that claims by custom on behalf of indefinite bodies might lead to serious interference with proprietary rights has caused the Courts to lay it down, that a claim to *profits à prendre* by custom cannot be good[3], except in the single case of copyholders, who, by reason of the baseness of their estate, could not formerly claim by prescription[4]. Moreover, the Courts have imposed rather severe restrictions on the extent of the rights which may be claimed by custom[5]; but the strict rule which applies to true incorporeal hereditaments, viz. that they must rigidly conform to types legally recognized, does not seem to limit the rights which may be claimed by custom. It is indeed only by drawing a clear line of distinction between customary rights and true incorporeal

Not to profits, except by copyholders.

[1] Except indeed by Crown grant, which would implicitly constitute them a corporation. But such a grant will not be presumed in the absence of evidence. See *Lord Rivers* v. *Adams* (1878) 3 Ex. D. at p. 365 seqq.

[2] *Fitch* v. *Rawling* (1795) 2 H. Bl. 393.

[3] *Lord Rivers* v. *Adams* (1878) 3 Ex. D. 361; *Gateward's* Case (1607) 6 Rep. 59 b. But the severity of this rule is modified by the admissions that unincorporated persons may (*a*) prescribe through a person capable of taking by prescription (*White* v. *Coleman* (1673) 3 Keb. 247), or (*b*) establish a trust against such a person (*Goodman* v. *Mayor of Saltash* (1882) 7 App. Ca. 633).

[4] *Foiston* v. *Crachwoode* (1587) 4 Rep. 31 b.

[5] *Bourke* v. *Davis* (1889) 44 Ch. D. 110; *Edwards* v. *Jenkins*, 1896, 1 Ch. 308.

hereditaments, that we can reconcile the recent decision in *A. G.* v. *Wright*[1], with the established doctrine that there cannot be an easement in gross. Once more, a claim by custom is distinguished from a claim by prescription, by the fact that, in spite of the express words of the Prescription Act[2], proof of enjoyment for a shorter than the statutory period may be accepted as evidence of the existence of a custom[3], though it cannot raise a presumption of a prescriptive right[4]. But, in general, the periods specified by the Prescription Act apply, at least in favour of the claimant, to claims by custom equally with claims by prescription[5].

Enforcement of claims.

Claims by prescription and custom may be enforced either positively, by an action for damages and injunction against any person who disturbs them, or negatively, by setting up the claim as a defence to an action brought by the person who alleges his rights to have been interfered with by the exercise of the claims. But the grounds upon which such a claim is based must be expressly stated in the pleadings, a rule which applies also to exceptions based upon the alleged disability of the person against whom the claim is set up[6].

[1] 1897, 2 Q. B. 318.
[2] 2 & 3 Will. IV. (1832) c. 71. § 6.
[3] *Hanmer* v. *Chance* (1865) 34 L. J. (N. S.) Ch. 413.
[4] *Bailey* v. *Appleyard* (1838) 8 Ad. & E. 161.
[5] 2 & 3 Will. IV. (1832) c. 71. §§ 1, 2.
[6] 2 & 3 Will. IV. (1832) c. 71. § 5, as modified by R. S. C., O. xix. r. 4. See *Harris* v. *Jenkins* (1882) 22 Ch. D. 481.

CHAPTER XV.

4. BANKRUPTCY AND DEBT.

Liability of lands for debts.

To the average member of a modern commercial community, it would appear highly unreasonable that a creditor should not be able to enforce his claims against the lands of his debtor. That a man should be in the enjoyment of a handsome income from rents, while his creditors are unable to obtain payment of their demands, at the present time seems inconsistent, not only with policy, but with common honesty.

Pre-feudal ideas.

And yet, a very slight acquaintance with legal history is sufficient to convince the student that such an attitude is extremely modern. Early systems of law do not recognize resort to a debtor's lands for payment of his debts; it is only by slow and difficult steps that the creditor attains his modern position. It is often said that the anomaly is due to feudal influences. But a somewhat more careful attention to legal history than is paid by those writers who glibly attribute all features of unknown origin to 'the feudal system,' will probably suggest that the exemption of lands from execution for debt is due to far more deep-rooted and older causes than feudal ideas[1]. Here it is sufficient to allude to the subject, to account for the complexity in which the law concerning recourse to a debtor's lands is still involved.

The right of recourse having been once established, it soon

[1] For the general history of the subject, see the author's *Law and Politics in the Middle Ages*, pp. 220-224; for the course of English Law, Digby, *History of the Law of Real property* (3rd ed.), cap. v. § 5.

became evident that there were two ways in which its exercise might be permitted. Either each creditor might be allowed to enforce his own individual claim, regardless of the interests of other claimants; or a general distribution of the debtor's assets might be made for the benefit of all his creditors.

Execution. The former method gave rise to the law of Execution against land; the latter to the law of Bankruptcy. Historically speaking, the process of bankruptcy is more modern than the process of execution [1]; but as it can be the more briefly stated of the two, it will be better to deal with it at once.

Bankruptcy. Bankruptcy Act, 1883. Bankruptcy Act, 1890.

The law of bankruptcy is now virtually contained in the Bankruptcy Act, 1883 [2], and its amendments, of which the most important is the Bankruptcy Act, 1890 [3]. By virtue of these Acts, a receiving order against any debtor may be obtained either by the debtor himself or by a creditor, upon proof of certain conditions; and the effect of the receiving order will be, to constitute the official receiver a quasi-trustee and manager of all the debtor's property [4]. If the bankruptcy proceedings fail, or are stayed by reason of the acceptance by the creditors of a scheme of arrangement, the official receiver's hold will be relaxed, and the title to the debtor's property will, in the future, be unaffected by the proceedings [5]. But if the proceedings continue, and the debtor be adjudicated bankrupt, the whole of his property will be vested permanently in the official receiver or, if a trustee be appointed, in the trustee, and will pass from trustee to trustee, *ipso jure*, as new trustees are appointed [6]. The terms and conditions upon which a creditor or a debtor may present a bankruptcy

Title of official receiver and trustee.

[1] The oldest English bankruptcy statute is believed to be the 34 & 35 Hen. VIII. (1543) c. 4. It is not confined to merchant debtors. On the other hand, the process of execution against lands is at least as old as 1285 (13 Edw. I. c. 18).

[2] 46 & 47 Vict. c. 52. [3] 53 & 54 Vict. c. 71.

[4] Bankruptcy Act, 1883, §§ 5, 9.

[5] ib. § 104, *Re Wemyss* (1884) 13 Q. B. D. 244. But it is in the discretion of the Court, not of the creditors, to rescind the receiving order. *In re Flatau*, 1893, 2 Q. B. 219.

[6] Bankruptcy Act, 1883, §§ 20, 54.

petition are not part of our subject, which merely concerns bankruptcy proceedings as they affect the title to interests in land. But it is material to observe, that the title of the trustee relates back, not merely to the order of adjudication, nor even to the receiving order, but to the commission of the act of bankruptcy upon which the petition was founded, or, when more than one act is proved, to the first of such acts which shall have happened within three months prior to the presentation of the petition [1]. The result is, that conveyances of land made by a bankrupt prior to the date of the receiving order against him, may be set aside by the trustee. But, as this rule would work great hardship if not qualified, it is expressly provided by the Act, that it shall not apply to defeat a conveyance for valuable Consideration made by the debtor, and actually completed before the date of the receiving order, to a person who had not, at the time of such completion, notice of any available act of bankruptcy committed by the debtor [2].

Protection of innocent purchasers.

On the other hand, it is provided that the adjudication in bankruptcy shall invalidate, as against the trustee, certain antecedent transactions which, but for these provisions, might constitute steps in the titles of other persons. These transactions are as follow:

Invalidation of certain transactions.

(i) *Seizure of land under execution by a creditor.* As we shall hereafter see, a creditor who obtains a judgement against his debtor is entitled to enforce it by levying execution against the debtor's land. If, however, the execution is not 'completed' before the date of the receiving order, it will not avail to give the execution creditor any advantage over the other creditors in the bankruptcy, or to affect the trustee's title. Execution against land is 'completed' by seizure; against an equitable interest, by appointment of a receiver [3].

Preferential executions.

(ii) *Voluntary settlements.* A conveyance of a man's property may be perfectly free from fraud, and from any intention to

Voluntary settlements.

[1] Bankruptcy Act, 1883, § 43.
[2] ib. § 49. [3] ib. § 45.

delay or defeat creditors[1], and yet, if it be a 'voluntary' one, i. e. a conveyance made upon any other than valuable Consideration, it may be liable to be upset upon the settlor's subsequent bankruptcy. It will be absolutely void if he becomes bankrupt within *two* years from the date of the conveyance (which, in this case, means, of course, the true, not the nominal date); and it will be void if he becomes bankrupt within *ten* years from the date, unless the parties claiming under it can show that the bankrupt was, at the time of making it, able to pay all his debts without the aid of the property comprised in it, and that the interest of the bankrupt passed to the trustees of the settlement on the execution thereof[2]. A settlement made in Consideration of future marriage is not a voluntary settlement, and is, therefore, not within the Act; but a real exception is made by the statute in the case of a settlement made by a man upon his wife or children, of property which has accrued to him since marriage in right of his wife. For this latter is, technically, a voluntary settlement[3]. As to the effect of this section, it is to be observed that it was made for the protection of creditors, not of bankrupts; and therefore, it will only operate in favour of the trustee in bankruptcy, and to the extent necessary to satisfy the creditors[4]. Moreover, a purchaser for valuable Consideration, and *bona fide*, of any property comprised in such a settlement is protected under the 47th section[5].

Other preferential transactions.

(iii) *Other preferential transactions.* Every conveyance of property, or charge thereon, made to any creditor 'by any person unable to pay his debts as they become due from his own money,' with a view of giving such creditor a preference, is by the Act made fraudulent and void as against the trustee in bankruptcy, if the maker becomes bankrupt upon a petition

[1] In which case it would, of course, be void under the statute 13 Eliz. (1571) c. 5 as explained *post*, cap. xvii.

[2] Bankruptcy Act, 1883, § 47.

[3] Cf. § 47.

[4] *In re Sims* (1897) 45 W. R. 189.

[5] *Carter's & Kenderdine's Contract*, 1897, 1 Ch. 776.

presented within three months after the commission of the act of preference[1]. The section gives rise to many difficulties of application, especially with regard to the interpretation of the 'intent' clause. The most important point established appears to be, that a payment or transfer of property, made by a debtor in response to *bona fide* and substantial pressure by a creditor, is not a fraudulent preference, even though the debtor be *de facto* insolvent[2]. The rights of any person making a title in good faith and for valuable Consideration through a creditor of the bankrupt, are expressly saved by the Act[3].

Property not passing to trustee in bankruptcy.

From the general rule, that the property of a bankrupt, vested in him at the commencement of the bankruptcy, or devolving upon him before his discharge, passes to the trustee, the following exceptions are recognized:

Trust property.

(i) *Property held by the bankrupt on trust for any other person*[4]. Though the Act only mentions 'trust,' the same principle extends to property held by the bankrupt as executor or administrator[5], and presumably therefore to property held by him as Real Representative under the Land Transfer Act, 1897[6]. It covers also the proceeds of trust property which has been sold, even though these are in the form of money, and have been mixed with the proper moneys of the bankrupt[7].

Necessaries.

(ii) *Tools and necessaries.* It is provided by the Act[8], that the tools (if any) of the bankrupt's trade, and the necessary wearing apparel and bedding of himself, his wife and children, to an amount not exceeding £20, shall not pass to the trustee. Presumably, the bankrupt could be called upon by the trustee

[1] Bankruptcy Act, 1883, § 48.

[2] *Re Tweedale*, 1892, 2 Q. B. 216; *Re Wilcoxon* (1883) 23 Ch. D. 69; *Re Bird* (1883) 23 Ch. D. 695.

[3] § 48 (2). [4] § 44 (1). [5] *Re Winsmore* (1742) 1 Atk. 101.

[6] 60 & 61 Vict. c. 65. § 2.

[7] *Knatchbull* v. *Hallett* (1880) 13 Ch. D. 696. And if the proceeds have been re-invested in other property, the same result will follow (Jessel, M. R., at p. 709). *Hancock* v. *Smith* (1889) 41 Ch. D. 456.

[8] § 44 (2).

to select such articles as he claimed to retain under this provision; but the subject is not material for purposes of land law.

Subsequently acquired leaseholds.

(iii) *Leaseholds acquired since adjudication.* It appears to be the somewhat anomalous result of judicial decisions, that, while a socage or copyhold estate which devolves upon the bankrupt after the commencement of the bankruptcy, but before discharge, will vest at once in the trustee [1], the same result will not follow in the case of leaseholds, until the trustee actually claims the property. And any intermediate alienation, at any rate an alienation for value to a *bona fide* purchaser, will be protected [2]. No doubt the decisions have largely proceeded on the view that a trustee may wish to disclaim leaseholds; but it might be well to give him the option.

Disclaimer by trustee in bankruptcy.

The mention of disclaimer brings us to one of the most curious points of conveyancing law which can arise in connection with bankruptcy. The trustee of a bankrupt's estate enjoys the peculiar privilege of disclaiming any property which may come to him through the bankruptcy burdened with onerous liabilities [3]. He need not alienate it, for he may be unable to find any one willing to accept it, even as a gift; he simply declares the bankrupt's interest to be non-existent, leaving other parties concerned to adjust their rights as well as they can [4]. In the ordinary case of onerous property, e.g. shares in companies, and contracts, the trustee may by mere writing disclaim, at any time within twelve months after the existence of the property has come to his knowledge as trustee [5]. But, in the case of leasehold interests, he must not disclaim without the leave of the Court, except in cases

Of leaseholds.

[1] *Re New Land Development Association*, 1892, 2 Ch. 138.

[2] *Clayton's & Barclay's Contract*, 1895, 2 Ch. 212. It seems to be very doubtful whether the doctrine will be further extended (*Re Clark*, 1894, 2 Q. B. 393).

[3] Bankruptcy Act, 1883, § 35 (1).

[4] They may, of course, prove in the bankruptcy for any loss occasioned by the disclaimer. ib. § 55 (7).

[5] ib. 55 (1); Bankruptcy Act, 1890, § 13.

provided for by the General Rules[1]. Any person interested may give the trustee notice in writing, requiring him to decide whether or not he will disclaim; and, if the trustee fails to disclaim within twenty-eight days after receipt of the notice, he will be precluded from afterwards doing so, unless the Court should enlarge his time for deliberation[2]. When a leasehold interest has been disclaimed, the Court may make an order vesting the property in any person interested. But if such person claims under the bankrupt, e.g. as mortgagee or sub-lessee, it can only do so upon his undertaking to perform such liabilities as would have vested in him if the lease had been assigned to him at the date of the filing of the bankruptcy petition[3]. If no person claiming under the bankrupt will accept the property on those terms, the Court may make a similar order vesting the property in any person liable on the covenants of the lease[4]. It is not too much to say, as was, in fact, said by the Court in a recent case, that these sections are 'very difficult to construe[5]'.

Special cases of bankruptcy.

Before leaving the subject of bankruptcy, it may be well to point out that, as a result of recent legislation, bankruptcy proceedings can affect property which formerly could not be brought within their scope. A married woman, trading apart from her husband by virtue of the custom of London, could always be made bankrupt in respect of her trading estate[6]; but now all married women so carrying on trade can be so treated *in respect of their separate property*[7]. The wife of a man *civiliter mortuus*, and possibly also a woman who has

Married women.

[1] Act of 1883, § 55 (3). These Rules permit of disclaimer without the leave of the Court where, (1) the lease is unincumbered, (2) the value of the property is small, (3) no person interested objects. [See General Rules, 1890, No. 69 (1).]

[2] Bankruptcy Act, 1883, § 55 (4).

[3] ib. § 55 (6); Bankruptcy Act, 1890, § 13. If only part of the subject matter is dealt with by the vesting order, the liabilities may be proportionately restricted.

[4] Bankruptcy Act, 1883, § 55 (6); Bankruptcy Act, 1890, § 13.

[5] *Re Walker* (1895) 64 L. J. (N. S.) Q. B. 783.

[6] *Lavie* v. *Phillips* (1765) 3 Burr. 1776.

[7] 45 & 46 Vict. (1882) c. 75. § 1 (5).

been judicially separated from her husband, or has obtained a protection order against him, is in the position of an unmarried woman in respect of the bankruptcy laws[1]. Bankruptcy proceedings may now be taken against the estate of a deceased debtor; and, upon an order for administration in bankruptcy being made, the property of the deceased will vest in the official receiver[2]. Corporations cannot be made bankrupt, but analogous proceedings under the Companies Winding Up Act, 1890[3], and other statutes, will place the property of trading companies at the disposal of the official receiver, or the liquidators appointed with the approval of the Court[4]. An infant cannot be made a bankrupt, except, possibly, in respect of necessaries[5].

Deceased debtors.

Corporations.

Infants.

We now come to the far more difficult subject of the enforcement of their claims by individual creditors against the lands of their debtors.

Individual claims.

The first sub-division of the subject distinguishes between the enforcement of claims against the lands of a living debtor, and the enforcement of claims against the estate of a deceased debtor.

Against land of living debtor.

A. *Enforcement of debts against the lands of a living debtor.*

Here the first point to notice is, that, apart from claims by the Crown, the necessity for recording which was abolished by statute in 1865[6], no claim can be enforced against a debtor's lands until it has become a matter of record. So long as there is any doubt as to the debtor's liability, his lands cannot be touched. In the great majority of cases, the only way of getting a debt recorded is by suing the debtor in a court of record and obtaining *judgement* against him upon it. Recognizances and warrants of attorney, though still theoretically possible, have ceased, owing to various causes, to be used

[1] *Re Franks* (1831) 7 Bing. 762. In 1831 only traders were subject to the bankruptcy laws, and the wife in this case was a trader. But, presumably, the case would be different now.

[2] Bankruptcy Act, 1883, § 125.

[3] 53 & 54 Vict. c. 63.

[4] 25 & 26 Vict. (1862) c. 89. § 95.

[5] *Re Jones* (1881) 18 Ch. D. 109.

[6] 28 & 29 Vict. c. 104. § 47.

between private persons[1]. An order of a court of record directing payment of money is, of course, as effectual as a judgement[2].

It appears, therefore, that claims which can be directly enforced against the lands of a living debtor must take one of two forms, viz.

Crown debts.

(i) *Crown debts.* To any one familiar with the history of the process of execution against land, it will be common knowledge that the Crown had, from the earliest times, a special and prior claim to payment out of the lands of its debtors[3]. This claim appears, in course of time, to have been restricted to debts evidenced by record[4]; but a statute of the year 1541 extended it to obligations and specialties[5], and a subsequent statute of 1571 still further extended it to claims for defalcations by royal officials in a large number of cases[6]. The former statute made Crown obligations and specialties enforceable in the same way as statutes merchant and staple, i. e. by delivery of the lands of which the debtor was seised at the time when the obligation was made[7]. The latter added a special power of sale[8], and this remedy was made general in favour of the Crown by a statute of the year 1785[9].

Relation back.

Great hardship was sometimes caused by the doctrine, that the claim of the Crown related back to the time at which the liability, in respect of which the claim was made, was originally incurred. It was therefore provided, in the year 1839, that such claims should not affect the former lands of a debtor which had come into the hands of purchasers or mortgagees, until a memorandum of the particulars of such claim had

[1] Among recognizances may be mentioned the two special classes known as 'statute merchant' and 'statute staple' respectively. They were given the force of judgements by 13 Edw. I. st. iii. (ann. 1285) and 27 Edw. III. st. ii. c. 9 (1353) respectively. They are both obsolete.

[2] 1 & 2 Vict. (1838) c. 110. § 18.

[3] For a peculiarly oppressive use made of this priority, see the statute of 1350 (25 Edw. III. st. 5. c. 19).

[4] 33 Hen. VIII. (1541) c. 39. § 50. [5] ib. [6] 13 Eliz. (1571) c. 4.

[7] 33 Hen. VIII. (1541) c. 39. § 50 (3). [8] 13 Eliz. (1571) c. 4. § 2.

[9] 25 Geo. III. c. 35, expanded by 28 & 29 Vict. (1865) c. 104. § 50, and 29 & 30 Vict. (1866) c. 39. § 42.

been entered under the name of the debtor in the Index to Debtors and Accountants to the Crown, a list open to public inspection [1]. And a subsequent statute [2] enacted, that purchasers and mortgagees should be free from Crown claims in respect of liabilities of former mortgagees of the land in question, who had been paid off prior to the execution of the conveyance under which they claimed. Finally, it has been provided by a statute of the year 1865, that no Crown debts incurred after October 31, 1865, shall bind any *bona fide* purchaser for valuable Consideration or mortgagee (whether with or without notice of the existence of the debt), unless a writ of execution to enforce the debt has been issued and registered prior to the execution of the claimant's conveyance, and the payment of his purchase money [3].

Copyholds and Crown debts.

Estates tail.

It is very doubtful if copyholds can be taken in execution for a Crown debt. Until the passing of the statute of 1541, an estate tail was only liable during the lifetime of the debtor tenant-in-tail, being protected by the express words of the statute *De Donis* [4]. But the Act of 1541 extended the liability, in respect of the debts mentioned in the Act, to the issue in tail. A *bona fide* purchaser from the latter was, however, held protected in *Anderson's* Case [5].

Debts of private persons.

(ii) *Record debts of private persons.* The right of private creditors to enforce their debts against the lands of their living debtors, is generally assumed to date from the passing of the Statute of Westminster the Second [6]. Since that time, its developements have been so numerous, that it will be well

[1] 2 & 3 Vict. c. 11. § 8. Presumably this means that the entry must have been made before the person seeking exemption acquired his title. Re-registration every five years is required to protect the Crown claims against purchasers or mortgagees becoming such after Dec. 31, 1859 (22 & 23 Vict. (1859) c. 35. § 14).

[2] 18 & 19 Vict. (1855) c. 15. § 11.

[3] 28 & 29 Vict. c. 104. § 48.

[4] 13 Edw. I. (1285) c. 1.

[5] Ann. 1597. 7 Rep. 21. The debts mentioned in the Act are judgement, recognizance, obligation, or other specialty; and they probably cover only debts incurred directly to the Crown, not those which the Crown has acquired since their creation.

[6] 13 Edw. I. (1285) c. 18.

to deal with them under three distinct heads—(*a*) extent to which claims may be enforced (*b*) mode of enforcement (*c*) protection of purchasers against claims.

(*a*) *Extent of enforcement.* The Statute of Westminster the Second gave the creditor the alternative remedies of a writ of *Fieri facias*, and a new writ, called from its alternative character, the writ of *Elegit*. By the writ of *Fieri facias* the sheriff is to levy the debt of the lands and goods of the debtor; and, although it seems to have been generally assumed that this writ, in spite of the express words of the Act, did not include the debtor's socage or copyhold lands, it authorized the sale of his leaseholds, which are chattel interests, and, therefore, within the words of the writ[1]. By the writ of *Elegit* the sheriff is to deliver to the creditor all the chattels of the debtor (except his cattle and beasts of the plough) and one-half of his land 'until the debt be levied upon a reasonable price or extent.' Presumably, by analogy of the almost contemporary statute concerning Statutes Merchant[2], the writ of *Elegit* was held to cover the socage lands of the debtor; and so the creditor acquired a right of recourse against one-half of his debtor's socage lands. By the Statute of Frauds[3], this right was extended to the equitable interests of the debtor; but it seems doubtful whether the section was intended to cover equitable interests in leaseholds. All doubts as to this point, however, were set at rest by the passing of the Judgments Act, 1838, which expressly covered legal and equitable interests of all kinds, socage, leasehold, and copyhold, including estates tail to the extent to which they could be barred by the debtor without the consent of any other person, and which extended the remedy of the creditor to the whole of the debtor's lands[4].

Extent of enforcement. *Fieri facias.* *Elegit.* Judgments Act, 1838.

(*b*) *Mode of enforcement.* Under the Statute of Westminster

Mode of enforcement.

[1] *Taylor* v. *Cole* (1789) 3 T. R. 292.

[2] 13 Edw. I. (1285) st. III. c. 1 (17) (18). It is noteworthy that no right against the debtor's lands was given by the slightly earlier statute of Acton Burnel (11 Edw. I. ann. 1283).

[3] 29 Car. II. (ann. 1677) c. 3. § 10.

[4] 1 & 2 Vict. c. 110. § 11.

the Second, the creditor's remedy was merely to hold the lands until 'the debt be levied upon a reasonable price or extent[1].' These words were interpreted to mean, until the profits of the land, calculated at a reasonable estimate, should have satisfied the creditor's claim; but the creditor could be made to account by a court of Equity[2]. The creditor does not obtain actual possession of the land; but the return of the sheriff to the writ vests in him an interest which, though protected by the writ of *novel disseisin* under the old law, has always been held to be a chattel[3]. If necessary, however, he can obtain actual possession by an action of ejectment, provided the debtor's interest be a legal estate in possession[4]. The power of sale was first conferred by the Judgments Act, 1864[5], which provides that any creditor, to whom the land of his debtor has been actually delivered in execution, may, at any time while the registry of the writ of execution is in force, obtain from the court by petition an order for the sale of the debtor's interest, due regard being had to the claims of other incumbrancers.

Judgments Act, 1864.

Equitable execution.

If, however, the interest of the debtor be of an equitable nature, the judgement creditor must resort to what is known as 'equitable execution.' This consists in an application to the court to put in force the remedies formerly applied by the Court of Chancery to aid the judgement creditor in overcoming difficulties in the way of the exercise of his legal rights, and, in the majority of cases, takes the form of the appointment of a receiver of the incomings of the debtor's interest[6]. Such an appointment is a 'delivery in execution' within the terms of the Judgments Act, 1864[7]; and the creditor is therefore, the proceedings being duly registered, entitled under that Act to an order for sale of the debtor's

[1] 13 Edw. I. (1285) c. 18. [2] *Godfrey* v. *Watson* (1747) 3 Atk. 517.

[3] *Hatton* v. *Haywood* (1874) L. R. 9 Ch. App. 229; Co. Litt. 43 b.

[4] *Hatton* v. *Haywood*, at p. 236.

[5] 27 & 28 Vict. c. 112. §§ 4-6. This section virtually supersedes section 13 of the Act of 1838 (1 & 2 Vict. c. 110) which entitled a creditor, one year after entry up of his judgement, to such remedies as he would have had if the debtor had signed an agreement to charge the land.

[6] *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801. [7] 27 & 28 Vict. c. 112.

interest [1]. But a legal remainder cannot be made the subject of equitable or other execution [2].

The judgement creditor, until a few years ago, also had the right, in theory, to a writ of *levari faciae*, whereby the sheriff was ordered to raise the debt out of the debtor's goods and the profits of his lands. But the writ, after having been obsolete for centuries, was abolished for civil cases by statute in the year 1883 [3]. *Levari facias.*

(c) *Protection of purchasers.* The old rule, that the claims of the creditor bound the debtor's lands from the date of the recognizance or judgement, worked great hardship on purchasers who bought in ignorance of the existence of these claims. A remedy was first provided by the Statute of Frauds [4], which enacted that recognizances should, as against *bona fide* purchasers for value, only bind from the date of their enrolment. Shortly afterwards, a statute of the year 1692 required the registration of all judgements which it was intended to enforce against debtors' lands [5], and rendered all judgements not so registered invalid, even as against volunteers. The Judgments Act, 1838, repeated the requirement of registration, but limited the protection to purchasers, mortgagees, and creditors [6]; and an Act of the following year rendered re-registration every five years necessary [7]. The statute of 1860 added the requirement, that execution should have been issued and registered, and actually put in force within three months of registration [8]. But the Act only relates to judgements entered up after its passing (July 23, 1860), and it is silent as to creditors (other than mortgagees). Finally, the Act of 1864 provides that no future judgement [9] shall affect any land, until the land has actually been delivered in execution thereunder by means of Protection of purchasers.

Anglo-Italian Bank v. *Davies* (1878) 9 Ch. D. 275.
Re Harrison and Bottomley, 1899, Ch. 465.
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), § 46.
29 Car. II. (1677) c. 3. § 18.
4 & 5 W. & M. c. 20; rep. S. L. R. Act, 1867.
1 & 2 Vict. c. 110. § 19.
2 & 3 Vict. (1839) c. 11. § 4, explained by 18 & 19 Vict. (1855) c. 15. § 6.
23 & 24 Vict. c. 38. §§ 1, 2. [9] The Act was passed on July 29, 1864.

a writ or other process registered in pursuance of the last mentioned statute, but in the name of the debtor, not of the creditor[1]. This Act renders it, apparently, impossible to obtain a charge upon an estate in remainder by means of a judgement or order[2], although this result is in direct defiance of the 13th section of the Act of 1838, which is still, nominally, in force[3]. The protection which was given by the statute of 1855 to purchasers and mortgagees, in respect of the Crown debts of previous mortgagees, extends also to the judgement debts and executions of private creditors[4].

Fortunately for those whose duty it is to construe the various Acts to which allusion has been made in the preceding paragraph, the operation of the Statutes of Limitation[5] renders it almost impossible that a question on the earlier statutes should arise at the present day. The various registers contemplated by them have been consolidated by the Land Charges Registration and Searches Act, 1888[6]; and a useful section of the Settled Land Act, 1890[7], has provided for the vacation by order of the court of any registration of a writ or order affecting land.

Search register.

Vacation of charge.

Deceased debtors. Crown debts.

B. *Enforcement of debts against the estates of deceased debtors.*

(i) *Crown debts.* The rights of the Crown in respect of the lands of deceased debtors may be briefly disposed of, the priority of the Crown being recognized from very early times. The clause in *Magna Carta*[8] probably only refers to a limited class of Crown debtors, and only to enforcement against their chattels; but the statute of 1541 expressly extends the remedy of the Crown, on judgement, recognizance, obligation, or other specialty, to the lands, including the entailed estates, of its deceased debtor, and this whether or not the heirs are named

[1] 27 & 28 Vict. c. 112. §§ 1, 2, 3.

[2] *Hood Barrs* v. *Cathcart*, 1895, 2 Ch. 411.

[3] 1 & 2 Vict. c. 110. § 13. Only the temporary clauses were repealed by the S. L. R. Act, 1874.

[4] 18 & 19 Vict. c. 55. § 11.

[5] 37 & 38 Vict. (1874) c. 57. § 8. But a judgement may be revived by *sci. fa.*

[6] 51 & 52 Vict. c. 51, and Rules thereunder (1889).

[7] 53 & 54 Vict. c. 69. § 19.

[8] 9 Hen. III. (1225) c. 18.

in the recognizance or specialty [1]. But the simple contract debts of the Crown, though entitled to priority over those of private persons [2], are postponed to private specialty debts [3]. They are now, like all simple contract debts, payable out of the lands of the deceased, but only in due course of administration [4].

(ii) *Claims of private persons.* Happily, the law on this subject is not quite so complicated as that on the corresponding topic of remedies against living debtors. But it is too complicated to be disposed of in a single sentence. It will be better to distinguish between three classes of claims: (*a*) records; (*b*) specialties; (*c*) simple contracts [5]. Private claims.

(*a*) *Records.* The death of a person against whom a judgement has been enforced in such a manner as to establish a charge upon his lands does not affect the rights of his record creditor, who is still entitled to priority over all claimants other than actual previous incumbrancers. The manner of enforcement will depend on the date of the judgement, as appeared by the statement of the law on a previous page [6]. And a judgement against the representatives of the debtor will, if duly enforced, stand on the same footing as a judgement against the debtor himself [7]. But an unenforced judgement against the debtor has no direct operation upon his land, and will rank as a simple contract debt [8]. By record.

(*b*) *Specialties.* From the time at which the principles of the common law became established, it was the admitted By specialty.

[1] 33 Hen. VIII. c. 39. §§ 75, 76.

[2] *Re Henley & Co.* (1878) 9 Ch. D. at p. 481.

[3] *Bentinck* v. *Bentinck*, 1897, 1 Ch. 673.

[4] See post, p. 264.

[5] The term 'simple contract' is here used to denote claims which are not evidenced by record or specialty, whether they, in fact, arise out of contract or out of tort.

[6] Ante, p. 258.

[7] i. e. as against his land. As against his personal representatives, it will stand in a better position. *Re Williams* (1872) L. R. 15 Eq. 270. The personal representative should, therefore, in the interests of the other creditors, anticipate it by an administration order. *Re Stubbs* (1878) 8 Ch. D. 154.

[8] *Van Gheluive* v. *Nerinckx* (1882) 21 Ch. D. 189.

rule, that if a man bound himself and his heirs by specialty, his heir was bound to make good the debt, to the extent of the lands descended to him from his ancestor[1]. This rule was, no doubt, the offspring of the doctrine of warranty[2]; but it survived its parent, and remained absolute law till the passing of Hinde Palmer's Act[3] rendered it comparatively unimportant. A somewhat tardy amendment has since made it unnecessary for the heirs to be mentioned in the specialty[4].

Estates tail and equitable interests.

But the common law doctrine was strictly confined to legal estates in fee simple; estates tail being protected by the statute *De Donis*[5], and equitable interests not being regarded as within the doctrine of warranty. The latter were, however, included in the liability by the Statute of Frauds[6], which also made estates *pur auter vie*, coming to the heir as special occupant, assets by descent. Finally, copyholds were brought within the circle of liability to specialty claims, by the general statute of the year 1838[7]. Despite the passing of Hinde Palmer's Act (shortly to be explained) specialty creditors of a deceased debtor have still one distinct advantage over simple contract creditors, in that they can sue the heir (or, now, the real representative) directly, and hold him responsible to the extent of the real assets, without asking for an administration by the Court[8]. This privilege does not, however, apply to copyholds, which are only made *equitable* assets by the Act of 1833[9]. We have seen, also, that private specialty creditors rank before Crown claims on simple contract, while ordinary creditors do not[10].

Copyholds.

Devises.

The common law rule, moreover, originally only applied strictly as against *heirs*; and, after the power to devise lands had been granted by statute, a specialty creditor frequently

[1] Blackstone, *Comm.* (4th ed.), II. 340.

[2] See Statute of Gloucester, 6 Edw. I. (1278) c. 3.

[3] 32 & 33 Vict. (1869) c. 46.

[4] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 59. The Act only applies to future specialties.

[5] 13 Edw. I. (1285) c. 1.

[6] 29 Car. II. (1677) c. 3. §§ 10, 12.

[7] 3 & 4 Will. IV. c. 104.

[8] *Re Hedgely* (1886) 34 Ch. D. 379.

[9] 3 & 4 Will. IV. c. 104.

[10] *Bentinck* v. *Bentinck*, 1897, 1 Ch. 673.

found himself defrauded of his recourse against his deceased debtor's lands, by the fact that they had been devised to strangers. To remedy this defect, a statute, known as the Statute of Fraudulent Devises[1], was passed in the year 1691, and by it a devisee was made liable, in the same way as an heir, to the specialty debts of his testator. The new rule introduced by this statute has been re-enacted in various subsequent Acts of Parliament[2]; and, though it has been rendered less important by the Land Transfer Act, 1897[3], it is still, technically, in force.

By 'simple contract.'

(c) *Simple contract claims.* For a long time these were not enforceable against the land of a deceased debtor; unless the latter had by his Will expressly charged his land with the payment of his debts. In the latter case, the Court of Chancery, though the creditor had no legal claim against the land, would decree the administration of the deceased's estate, and order payment thereout of the debts charged. And, in so doing, the court would not recognize any priority of specialty debts, in dealing with 'equitable assets,' i. e. property which, but for its help, could not have been made available for payment of debts[4]. The first statutory recognition of the rights of simple contract creditors was contained in an Act of the year 1807[5], which provided, that all the lands[6] of a deceased *trader* should be liable in equity to the payment of his debts, whether by specialty or simple contract. But, though the

Equitable assets.

[1] 3 & 4 W. & M. c. 14.

[2] 6 & 7 Will. III. (1695) c. 14; 47 Geo. III. st. II. (1807) c. 74; 11 Geo. IV. & 1 Will. IV. (1830) c. 47. §§ 3, 4. If there was an heir at law, he had to be joined.

[3] 60 & 61 Vict. c. 65. § 1.

[4] And, if the legal assets were exhausted by the specialty creditors, the Court would 'marshal' an equivalent amount of the equitable assets to satisfy the claims of the simple contract creditors, before allowing the specialty creditors to have recourse to the equitable assets. This rule held good, even though the legal assets were only personalty. See form of decree in *Plunket* v. *Penson* (1742) 2 Atk. 290.

[5] 47 Geo. III. st. II. c. 74.

[6] i. e. all the lands then available for specialty creditors, which, it will be remembered, did not, at that time, include copyholds.

benefit of that Act could only be obtained through the medium of a court of Equity, it was expressly provided[1] that the specialty creditors should be paid in full out of the assets rendered available by the Act, before the simple contract creditors received anything. This priority was preserved by the re-enacting section of the Act of 1830[2], and also by the Act of 1833, which extended the liability for simple contract debts to the lands of deceased non-traders[3]. But, in respect of the estates of debtors who have died since December 31, 1869, the priority of specialty creditors has been entirely abolished by Hinde Palmer's Act[4], except in so far as they can secure priority by obtaining judgements against the real representative, heir, or devisee of the debtor, before administration is ordered[5].

Hinde Palmer's Act.

Locke King's Acts.

It must be remembered, that the personalty of a deceased debtor is always regarded as the primary fund out of which his debts, including those by specialty, are to be paid; and this rule, which remains unaltered by the Land Transfer Act, 1897[6], would justify an heir or devisee who had been compelled to discharge a debt of the deceased, in demanding repayment from the latter's personal representatives. But an important modification of the rule, introduced by Locke King's Acts[7], renders the real estate of a deceased person, as between the various beneficiaries, primarily liable for the payment of incumbrances (including mortgages and liens for unpaid purchase money) which may be specially charged upon it. The provisions of these Acts do not, of course, affect the remedies of the persons entitled to enforce the mortgage or other incumbrance[8].

Marshalling.

Finally, it should be noticed that, as a result of the equitable

[1] 47 Geo. III. (1807) st. II. c. 74. § 1.
[2] 11 Geo. IV. & 1 Will. IV. c. 47. § 9.
[3] 3 & 4 Will. IV. c. 104.
[4] 32 & 33 Vict. (1869) c. 46.
[5] *Re Hedgely* (1886) 34 Ch. D. 379.
[6] 60 & 61 Vict. c. 65. § 2 (3).
[7] 17 & 18 Vict. (1854) c. 113; 30 & 31 Vict. (1867) c. 69; 40 & 41 Vict. (1877) c. 34. But these Acts operate from different dates.
[8] 17 & 18 Vict. (1854) c. 113. § 1.

doctrine of 'marshalling of assets,' the pecuniary legatees of a deceased landowner may be entitled to claim against his land, if the fund primarily available for the payment of legacies, viz. the personalty, has been exhausted by the recourse to it of creditors who are also entitled to satisfaction out of the realty[1]. But this subject really belongs to the domain of pure Equity, as there is no means of enforcing such a claim without resort to the administrative jurisdiction of the court.

[1] *Rickard* v. *Barrett* (1857) 3 K. & J. 289.

CHAPTER XVI.

5. MARRIAGE.

Marital rights.

By the common law, the marriage of either a man or a woman worked a substantial effect upon his or her title to land, whether already acquired or subsequently acquired. Recent legislation has greatly diminished without entirely abolishing this effect. Unfortunately, the piecemeal character of this legislation renders it impossible to disguise the fact, that the law on the subject of marital rights is extremely complicated.

We may deal with the topic under the two heads which naturally divide all questions arising on the subject, viz. (*a*) rights of the wife in the land of her husband, (*b*) rights of the husband in the land of his wife. It will be necessary also to add a few words upon the rights of third parties, in so far as these are affected by marital rights.

Wife's rights. Dower. At common law.

(*a*) *Rights of the wife.* At the common law, a widow was entitled to a life interest in one-third of all land of which her husband had been solely seised for an estate in possession of inheritance at any time during the coverture [1]. It mattered nothing that the husband had conveyed away the land during his lifetime, nor, *a fortiori*, that he had disposed of it by Will [2]. For the wife's right, though only enforceable after her husband's death, was indefeasible from the moment of the marriage, or the acquisition of seisin, whichever was latest. Moreover, although her claim did not extend to equitable

[1] Co. Litt. 30 b. A tenant in common was deemed to be 'solely seised,' but not a joint-tenant (ib. 37 b).

[2] ib. 32 a.

interests[1], it could be made against estates tail[2], and even against incorporeal hereditaments, if the latter were capable of division[3]; and the seisin of the husband need not have been actual, it was sufficient if he obtained seisin in law[4]. Again, it was not necessary to the maintenance of her claim, that the widow should have actually had issue by her husband; it was sufficient if any children which she might have had by him would have been capable, under any circumstances, of inheriting the land as heir to their father[5].

Difficult to release.

The great objection to the wife's common law rights arose from the fact that it was very difficult and expensive for her to release them, even where it would clearly have been for her advantage to do so. An ordinary conveyance by a married woman, even when made with her husband's consent, was worthless; a conveyance by fictitious lawsuit was troublesome and costly. Littleton gives examples of three special kinds of dower which, if accepted by the wife in lieu of her common law rights, might bar her claims at the common law[6]. But these special kinds of dower were only available under special circumstances, and afforded no real protection to purchasers; and the jointure contemplated by the Statute of Uses was hedged about by so many provisoes, that it was equally ineffectual to provide a remedy[7]. In order to render lands freely alienable, conveyancers hit upon the complicated system of 'uses to bar dower,' whereby it was so arranged that a conveyance of land to a purchaser should never confer upon him a sole seisin of an estate of inheritance[8]. But even this device was not adequate, for it could not protect inherited land; and it could only protect devised land, if the devise was

[1] See an interesting explanation of this anomaly by Lord Redesdale in *D'Arcy* v. *Blake* (1805) 2 Sch. & Lef. 387.

[2] Co. Litt. 31 b.

[3] ib. 32 a. Thus a widow might have been (and still may be) endowed of the third part of the profits of a mill, a third of common certain, &c.

[4] ib. 31 a.

[5] ib. 30 b, 40 a.

[6] ib. 34 a—39 b. Dower *de la pluis beale* was no protection to purchasers.

[7] 27 Hen. VIII. (1535) c. 10. §§ 6-9.

[8] As to the form of these, see Davidson, *Conveyancing* (2nd ed.), vol. ii. pp. 161-3.

Under the Dower Act.

technically worded. So at length the difficulty was solved by the passing of the Dower Act of 1833[1], which governs the claims to dower of women married after January 1, 1834. Sixty-five years have now elapsed since that statute came into operation; and it is, therefore, highly improbable, regard being had to the provisions of the Statutes of Limitation, that any claim to dower by virtue of the old law will ever arise to trouble the future conveyancer[2].

The Dower Act of 1833 may be said to have had for its object the postponement of a widow's claim in dower to every expression of intention by her husband, direct or implied, to favour any other person before her. In the way of direct expression of intention, any declaration by the husband in any deed (whether the instrument by which the land was conveyed to him or not)[3] or in his Will[4], that his wife shall not be entitled to dower out of any or all of his land, is a complete bar to her claim; and any conditions or restrictions which he may impose upon her right by his Will are binding on her[5]. In the way of indirect expression, any alienation or incumbrance affecting the land created by the husband, any debts incurred by him which can be enforced against the land, any contracts respecting the same, will bar her right *pro tanto*[6]. And any devise to her by his Will, of land out of which she would otherwise have been entitled to dower, is an absolute bar, unless a contrary intention shall be declared by the Will[7]. Inasmuch as the essential point is the intention of the husband,

[1] 3 & 4 Will. IV. c. 105.

[2] The widow's right is barred if she do not bring her action within twelve years of her husband's death (*Marshall* v. *Smith* (1865) 5 Giff. 37) or the last payment; and only six years' arrears of unpaid dower can be recovered (3 & 4 Will. IV. (1833) c. 27. § 41).

[3] 3 & 4 Will. IV. c. 105. § 6. [4] ib. § 7. [5] ib. § 8.

[6] ib. § 5. It has been decided that the debts mentioned in this section comprise only debts which the husband has himself charged on the land, not debts which by mere operation of law the creditors are entitled to enforce against it (*Spyer* v. *Hyatt* (1855) 20 Beav. 621).

[7] 3 & 4 Will. IV. c. 105. § 9. The bar is equally operative if the interest devised to the widow is merely a share of the proceeds of land directed to be sold (*Re Thomas* (1886) 34 Ch. D. 166).

it is presumed that such a devise would be equally effectual to bar dower, even though it were inoperative to pass any interest to the widow, e. g. because the testator had disposed of the land comprised in it before his death. But it is expressly provided by the Act, that a bequest of personalty by the husband shall not, of itself, operate as a bar to dower[1].

As a slight compensation for the rights which a widow loses by the Dower Act, she is given a claim to dower, provided it be not barred, out of her husband's equitable interests[2], and even out of his rights of action and entry to recover land, provided that she sues for or obtains such dower before the expiration of the period during which such rights of action or entry might be enforced[3]. It is one of the curious and, perhaps, unforeseen consequences of these changes, that a limitation in the form of the old uses to bar dower will not deprive of her dower a woman married since January 1, 1834[4].

Enforcement of dower.

A widow's claim in dower cannot, unlike a husband's by Curtesy, be enforced by simple entry on the lands. Formerly there were more than one special form of action open to the widow[5]; but now an ordinary action (usually in the Chancery Division) against the heir, is the proper remedy. The widow is entitled, in the case of legal estates, to have her share of the land 'set out by metes and bounds'; and, upon due proof of her title, the court will order an inquiry as to which of her husband's lands are subject to her claims, and will then order a commission to issue for the purpose of assigning her share[6]. When this process is completed, she will be entitled to hold the land assigned, as tenant of the husband's heir[7]. But if

[1] 3 & 4 Will. IV. c. 105. § 10.

[2] ib. § 2.

[3] ib. § 3. Query, would she have any right to insist on the heir prosecuting his ancestor's claim?

[4] Nor will a declaration against dower contained in an instrument executed before the passing of the Dower Act (*Fry* v. *Noble* (1855) 7 De G. M. & G. 687, *dub.* Turner, L. J.).

[5] These special forms were abolished by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), § 26.

[6] See form of decree in Seton, *Decrees* (5th ed.), ii. 806.

[7] Blackstone, *Comm.* (4th ed.), II. 136.

her claim is to dower out of an incorporeal hereditament, she cannot, of course, obtain possession, and must be content to enjoy her right in the manner directed by the court. And her claim to dower out of equitable interests is enforceable only in Equity, and, therefore, subject to the discretion of the court as to the mode of its exercise [1].

Duration of interest.

The interest of a dowress continues during her life, and cannot be lost by any act of hers subsequent to assignment. But it is forfeited by adultery during the lifetime of the husband [2]; and by detention of the title deeds from the heir on the husband's death [3].

Freebench.

The Dower Act of 1833 does not apply to copyholds; and the widow's right to freebench is, therefore, unaffected by its provisions.

Lease-holds.

Against her husband's leaseholds, the widow had never any claim, except in respect of her distributive share of his personalty. It is assumed that the Land Transfer Act, 1897 [4], will not in any way alter the widow's rights to dower, except, possibly, in respect of the proceedings to enforce them [5].

Intestates' Estates Act, 1890.

Mention must, however, be made of an important recent statute, the Intestates' Estates Act, 1890 [6], which may in many cases confer upon a widow substantial rights against the land of her deceased husband. The Act, as its name implies, deals only with the estates of intestates; but, with regard to them, it provides that, if there are no issue of the deceased living at his death, his widow shall be entitled to a primary charge of £500 upon the net value of his estate, real and personal, before any distribution is made under the Statutes of Distribution [7]. After payment of this £500, the estate will be dealt with as before the Act, the widow's claim to dower and distributive share remaining unaffected by her preference of £500, except,

[1] Dower Act, 1833 (3 & 4 Will. IV. c. 105), § 2.

[2] 13 Edw. I. (ann. 1285), st. I. c. 34 (4). Her claim, however, is restored on proof of forgiveness by him, extended without compulsion.

[3] Blackstone, *Comm.* (4th ed.), II. 136.

[4] 60 & 61 Vict. c. 65.

[5] e. g. the real representative will probably have to be made a defendant to an action to establish dower.

[6] 53 & 54 Vict. c. 29.

[7] ib. § 2.

of course, in so far as the satisfaction of that claim has reduced the value of the deceased's estate [1]. A recent decision [2] has very reasonably interpreted the Act to mean, that the widow's preferential allowance of £500 shall come rateably out of the net value of the deceased's real and personal estate, as it stood at the time of his decease. Thus, if a man dies intestate, leaving £1500 realty and £1000 personalty, the realty will contribute £300 and the personalty £200 towards the widow's £500, the value of each kind of property being estimated as from the decease of the intestate, less the amount of the debts primarily chargeable upon it. If the total net value of the estate is less than £500, the widow takes all [3].

Husband's rights.

(*b*) *Rights of the husband.* These are, unfortunately, much more complicated than the rights of the wife, and can only be clearly set out by a reference to three historical stages.

At common law.

Estate by the curtesy.

(i) *Rights of the husband by the common law.* A man whose wife was actually seised, at any time during their marriage, of lands of inheritance in possession, was entitled, on the birth of issue by him who might by possibility inherit the land as heir to the wife, to an estate for life in the lands [4]. There seems to have been some little obscurity as to the precise period at which the husband's right commenced. He was entitled to do homage to the lord in respect of the land as soon as issue was born; and an alienation by him of his interest during the lifetime of the wife was binding both on him and on the wife's heir. But his title was not 'consummate' till her death; and, during her life, he was looked upon as holding in her right, though there was no means of making him account for the profits [5]. After the wife's death, he became entitled in his own right for his life; nor did his interest cease on remarriage. His claims extended to incorporeal hereditaments, divisible and indivisible [6], and to equitable

[1] 53 & 54 Vict. c. 29. § 4.
[2] 53 & 54 Vict. c. 29. § 1.
[3] *Duret* v. *Charrière*, 1896, 1 Ch. 912.
[4] Co. Litt. 29 a, 40 a.
[5] ib. 30 a. It is clear that he was regarded as holding an estate of inheritance, otherwise he would not have done homage (ib. 66 b).
[6] ib. 30 b.

interests [1]. On the other hand, it only applied to interests of which the wife had been seised in deed, or of which she had been in actual enjoyment; because it was said to be his fault if her claims were not adequately prosecuted [2]. It was sufficient if the inheritable issue were born alive, whether they afterwards died or not [3]; and, by the custom of gavelkind, the birth of issue was not necessary to entitle the husband to claim by Curtesy [4]. The husband's claims were enforced by mere entry, supplemented, if necessary, by ejectment; and he was tenant to the lord, not to the wife's heir or the remainderman [5]. The rights of the husband in his wife's copyholds were regulated by the custom of the particular manors of which they were held [6]; but usually the custom gave the husband by Curtesy an interest corresponding with that of the wife by freebench [7].

Copyholds.

As regards leaseholds, whether vested in the wife at the date of the marriage, or subsequently acquired by her, the husband had a right to alienate them for his own benefit, and, in the meantime, was entitled to the income [8]. But, if he did not alienate them, and predeceased his wife, they survived to her; though, if she died before alienation, he did not require to make himself her administrator in order to show a good title to them [9]. But a *chose in action*, not reduced into possession during the marriage, could only be claimed by the husband after his wife's decease in the capacity of her administrator [10].

Leaseholds.

(ii) *Rights of the husband under the doctrine of 'separate estate.'* About the beginning of the seventeenth century, the Court of Chancery began to develope a remarkable theory, which practically enabled a married woman to enjoy the income and dispose of the *corpus* of land independent of marital claims. The doctrine depended entirely on the intention

Separate use.

Sweetapple v. *Bindon* (1705) 2 Vern. 536.

[2] Co. Litt. 29 a. [3] ib. [4] ib. 30 a. [5] ib.

[6] Ante, pp. 70–1.

[7] There is a mine of unexplored wealth in the manorial customs regarding the proprietary relationships of husband and wife.

[8] Co. Litt. 351 a. [9] *Yong* v. *Radford* (1615) Hob. 3.

[10] Co. Litt. 351 b. But see now, as to *choses in action* not being separate property, *Smart* v. *Tranter* (1890) 43 Ch. D. 587.

of the person from whom she acquired the land, and could not therefore, apply to inherited estates[1]. But, if an interest were conferred upon a woman, either before or during her marriage, by words which indicated an intention that she should enjoy it 'for her sole and separate use' (the precise words were immaterial), then all the claims of the husband (including his claim to curtesy) were postponed to the wife's enjoyment and disposal of the land during her lifetime, and after her death to her alienation by act *inter vivos* or Will[2]. So far, however, as her disposition did not extend, the common law rights of the husband continued, unless the conveyance of the wife's interest to her had expressly excluded them[3]. The details of the equitable doctrine of the 'separate use' belong to treatises specially concerned with the subject of Equity.

Recent statutes.

(iii) *Rights of husband under the Married Women's Property Acts.* In the year 1870 an entirely new departure was taken in the matter of the property of married women. As regarded women married after August 8, 1870, it was provided[4] that their rights in respect of property coming to them should no longer depend entirely upon the intention of the donor. The only section immediately affecting land is the 8th, which provides that the rents and profits of any land descending to a woman as heiress of an intestate shall belong to her for her sole and separate use. But the 1st section also clearly contemplates the acquisition of separate property by a married woman through the carrying on of a separate trade, or through the exercise of her literary, artistic, or scientific skill; and there is nothing in the section to prevent its operation upon land. The result was, that a married woman, though not legally competent to act as a *feme sole*, even in respect of her separate property, was practically entitled to give receipts for

[1] So clearly was this true, that where an equitable fee had descended on a married woman, the Court, in decreeing her equity to a settlement, expressly declined to exclude the husband's right to a tenancy by the curtesy (*Smith* v. *Matthews* (1861) 3 De G. F. & J. 139).

[2] *Cooper* v. *Macdonald* (1877) 7 Ch. D. 288. As to the capacity of a married woman to alienate, see post, pp. 282–7.

[3] *Morgan* v. *Morgan* (1820) 5 Madd. 408.

[4] 33 & 34 Vict. c. 93.

and dispose of the property described by the Act, independently of her husband's claims [1].

Act of 1882.

The Act of 1882 [2] went much farther and, to all intents and purposes, placed married women upon the legal footing of *femes soles*, so far as property is concerned, with a saving only for the vested rights of husbands. As regards women married since the passing of the Act, this description is true, with the exception to be hereafter noted [3]. As regards women previously married, their proprietary rights still depend partly upon the question whether, by the doctrines of equity or the provisions of the Act of 1870, they can establish a claim to separate estate. So far as regards property to which their title was acquired before January 1, 1883, that is their position. So far as property acquired since that date is concerned, they are in the position of *femes soles* [4].

Remaining rights of husband.

The exception to which allusion was formerly made consists in the still surviving right of the husband to Curtesy in land belonging to his wife, which she has disposed of neither by act *inter vivos* nor by Will. Conformably with the general principles of interpretation adopted with regard to the Married Women's Property Acts, it has been decided, that the husband's right to the Curtesy, not having been expressly abolished, is only postponed to the dispositive rights acquired by a married woman by virtue of the Acts [5]. And so, although the estate of a *feme sole* could not by any possibility be subject to a claim by Curtesy, that of a married woman may be. A similar construction also holds good in the case of personalty, although the husband's claim arises there, not by virtue of his Curtesy, but by virtue of his old marital rights in the ecclesiastical courts [6]. The result is, that, except so far as they are expressly barred by statute or conveyance, the husband's common law rights revive at the death of the wife.

[1] *Taylor* v. *Meads* (1865) 34 L. J. (N. S.) Ch. 203. [2] 45 & 46 Vict. c. 75.
[3] An amending statute of the year 1893 (56 & 57 Vict. c. 63) has removed certain doubts which arose on the construction of the Act of 1882.
[4] 45 & 46 Vict. (1882) c. 75. §§ 1, 2, 5.
[5] *Hope* v. *Hope*, 1892, 2 Ch. 336. [6] *Re Lambert* (1888) 39 Ch. D. 626.

CHAPTER XVII.

ALIENATION BY ACT OF THE PARTIES.

RESTRAINTS ON ALIENATION.

General right of alienation.

THE combined effects of the Statute of *Quia Emptores*[1], the Statutes of Wills[2], and the Act for the Amendment of the Law of Real Property[3] result, as we have seen, in the doctrine, that all interests in land are freely alienable by their owners, provided only that the legal forms are observed. The exceptions to this doctrine are so few and slight, that it will be well to dispose of them before proceeding to the detailed exposition of the modes of alienation. They fall naturally into two groups: (*A*) those which arise from the personal incapacity of the parties, and (*B*) those which arise from the illegal nature of the object contemplated by the alienation.

Incapacity of parties. Corporations.

A. Exceptions arising from personal incapacity.

1. *Corporations.* The general theory of corporations is far from clear in English law. A corporation, though in legal fiction a 'person,' is so obviously different from an ordinary individual, that the law of the ordinary individual can only be applied to it with reservations; and it is concerning the

[1] 18 Edw. I. (1290) c. 1. The Act did not bind the Crown, which was for long entitled to demand that its tenants *in capite* should not alienate without licence, on pain of forfeiture, afterwards fine (1 Edw. III. st. II. (1344) cc. 12, 13). But the abolition of tenure *in capite* (12 Car. II. (1660) c. 24) seems to have changed the doctrine.

[2] 32 Hen. VIII. (1540) c. 1; 7 Will. IV. & 1 Vict. (1837) c. 26.

[3] 8 & 9 Vict. (1845) c. 106. § 6.

precise extent and nature of these reservations that difference of opinion exists. Briefly speaking, there are two rival views, the application of which to legal principles leads to widely different practical results. The one is, that a corporation, being by fiction of law a person, can legally do, unless specially prohibited, any act which an individual can legally do. The other is, that a corporation, being an artificially created person, can only do the things which it was created to do.

Rival theories.

(1) A corporation may do anything not specially forbidden.

(2) A corporation may only do what it is specially created to do.

These rival views may be seen discussed at length in the leading case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, decided by the House of Lords in the year 1875 [1]. The general result of this decision, taken in conjunction with the older cases [2], appears to be, that a *common law corporation*, i. e. a corporation created by royal prerogative or prescription, may, except in so far as expressly prohibited, do any act which an individual can legally do; but that a corporation created directly [3] or indirectly [4] by a statute which defines the nature of its objects, can only do acts which are consistent with the objects laid down, directly or indirectly, by the statute. It must therefore be assumed that, while a purchaser from a common law corporation would, in the absence of fraud, be justified in relying merely upon the common law power of alienation residing in the corporation, a purchaser from a statutory corporation would be bound to satisfy himself that the alienation was within the powers of the corporation as defined by the statute. And any other alienation would be merely void. We have already seen [5] that an attempted alienation of land *to* a corporation without licence in mortmain, is a cause of forfeiture. And, it is hardly necessary to

Ashbury Co. v. *Riche.*

[1] L. R. 7 H. L. C. 653; and see judgements in courts below, L. R. 9 Exch. 224.

[2] e. g. *Sutton's Hospital* Case (1612) 10 Rep. at 30 b.

[3] *Eastern Counties Railway Co.* v. *Hawkes* (1855) 5 H. L. C. 331; *A.-G.* v. *G. E. Railway Co.* (1880) L. R. 5 App. Ca. at 481.

[4] *Ashbury Carriage Co.* v. *Riche* (1875) L. R. 7 H. L. C. 653.

[5] Ante, p. 217, and post, p. 290.

add, that any dealings in land by a corporation must be effected through the agency of its common seal [1]; though an omission of this formality does not always entirely destroy the effect of a transaction [2].

But, even to the rule that corporations not bound by the special terms of their creation may exercise free power of alienation, there are two important exceptions. These are the cases of (α) ecclesiastical, and (β) municipal corporations.

Ecclesiastical corporations.

(α) *Ecclesiastical corporations.* The benefactors of ecclesiastical corporations in early times usually contemplated a perpetual retention of their gifts by the donees; and this fact, combined with the natural reluctance of such bodies to part with their lands, appears to have rendered alienations of ecclesiastical lands (other than by way of lease for lives or years) somewhat rare. And it seems, that if the donor or any of his heirs were living when such an alienation was attempted, he could thereupon recover the lands by the writ of *contra formam collationis* [3]. But the change of ideas consequent upon the Reformation, combined with the change in the methods of land management caused by the economic revolution of the Tudor period, seems to have resulted in reckless alienation of ecclesiastical property, to the damage of the church and the scandal of the nation [4]. Accordingly, by a series of statutes of the sixteenth and early seventeenth centuries [5], all ecclesiastical persons, including masters and fellows of colleges and hospitals, were prohibited from alienating lands, held

Alienations of post-Reformation times.

Elizabethan statutes.

[1] *Rex* v. *Chipping Norton* (1804) 5 East, 239. The case mentioned in Woodfall, *Landlord and Tenant* (15th ed.), p. 17 n., viz. *Bird* v. *Higginson*, does not seem to touch the point, which must, however, be regarded as well settled, despite the scantiness of authority.

[2] e. g. a person holding under a parol demise from a corporation may be treated as a tenant from year to year (*Ecclesiastical Commissioners* v. *Merral* (1869) L. R. 4 Exch. 162).

[3] Fitzherbert, *Nat. Brev.*, 468 F. &c.

[4] Co. Litt. 44 a.

[5] 1 Eliz. (1558) c. 19; 13 Eliz. (1571) c. 10; 14 Eliz. (1572) c. 11; 18 Eliz. (1576) c. 11; 2 Jac. I. (1604) c. 3.

by them in right of their offices, for a longer period than three lives, or twenty-one years, at the customary rents[1]; and grants of even such leases in reversion were forbidden. But the great and continued fall in the value of money rendered these precautions insufficient; for the holders of ecclesiastical offices were able to obtain enormous sums by way of fines for renewal of leases at customary rents, which no longer represented the value of the property, and thus, by treating these fines as income belonging to them personally, to impoverish their successors for their own profit. And so still further restrictions upon the leasing of ecclesiastical lands were imposed by the Ecclesiastical Leases Act of 1836[2], which restrained within strict limits the practice of granting *renewals* of leases upon surrenders of unexpired terms. The Act is too minute in its provisions to be set out here; but, as it is still in force, its terms should be carefully studied by any practitioner called upon to advise concerning an ecclesiastical lease.

Fines on renewal of leases.

Improved powers.

On the other hand, it became evident about the beginning of the century, that the powers of leasing permitted to ecclesiastical bodies by the statutes of Elizabeth, were insufficient to enable such bodies to make the best use possible of their property in the interests of their successors. Accordingly, a series of Ecclesiastical Leasing Acts[3] has empowered them, with the consent of the Ecclesiastical Commissioners (a body incorporated by statute in the year 1836[4]), to make leases of their lands for periods and upon terms not authorized by the Tudor statutes. These Acts expressly contemplate the granting of building and mining leases, and of leases of watercourses and other easements; but they do not abolish the powers of leasing conferred by the older statutes, except as to lands in respect of which the newer statutory powers have

[1] The power to grant such leases had been expressly conferred by statute in 1540 (32 Hen. VIII. c. 28).

[2] 6 & 7 Will. IV. c. 20.

[3] 5 & 6 Vict. (1842) c. 108; 21 & 22 Vict. (1858) c. 57; 28 & 29 Vict. (1865) c. 57.

[4] 6 & 7 Will. IV. c. 77.

already been exercised [1]. It should be remembered, however, that even the older powers usually require the concurrence of all the persons interested in the property, e. g. dean *and* chapter, master *and* fellows, patron, ordinary, *and* incumbent [2].

The prohibition of permanent alienation, imposed by the statutes of Elizabeth, has also been relaxed in recent years in several cases. Thus, by the Episcopal and Capitular Estates Act, 1851 [3], a general power of dealing with their lands was conferred upon ecclesiastical corporations (other than colleges), but subject in its exercise to the approval of the Church Estates Commissioners (a committee of the Ecclesiastical Commissioners created by statute in the year 1850 [4]), and to elaborate conditions as to the disposal and investment of the moneys arising from such alienation. Somewhat similar powers are conferred upon the Universities and Colleges of Oxford, Cambridge, and Durham, and on the Colleges of Winchester and Eton, by the Universities and College Estates Acts [5]. A very important section of the last of these enables a university or college to exercise the powers of sale, enfranchising, exchange, partition, and leasing, conferred on a tenant for life by the Settled Land Acts [6]. Sales.

(β) *Municipal corporations.* The history, as well as the character, of municipal corporations brought them, before the passing of recent legislation, within the category of 'common law corporations.' Many of them were so old that their origin could be ascribed only to prescription; others Municipal corporations.

[1] 5 & 6 Vict. (1842) c. 108. § 8; 21 & 22 Vict. (1858) c. 57. § 9. The exercise of the older powers of leasing by parsons, vicars, &c., has been further regulated by 5 & 6 Vict. (1842) c. 27. But this Act is in some respects less favourable than the older Acts, and does not repeal them (*Jenkins* v. *Green* (1859) 28 Beav. 87). Lands newly assigned to archbishops and bishops, as endowments of their sees, are subject to the requirements of the 23 & 24 Vict. (1860) c. 124.

[2] Co. Litt. 44 a.

[3] 14 & 15 Vict. c. 104; amended by 21 & 22 Vict. (1858) c. 57.

[4] 13 & 14 Vict. c. 94.

[5] 21 & 22 Vict. (1858) c. 44; 23 & 24 Vict. (1860) c. 59; 43 & 44 Vict. (1880) c. 46; 61 & 62 Vict. (1898) c. 55.

[6] 61 & 62 Vict. (1898) c. 55. § 1.

owed their creation to an express exercise of the royal prerogative. And the objects for which they existed, or were supposed to exist, were so numerous and varied, that no restriction on the alienation of their property could be implied from the objects of their existence. Accordingly, municipal corporations exercised free powers of alienation, and, it is to be feared, with evil results. The only remedy against abuse lay in the prerogative writs of *scire facias* and *quo warranto*; and these were as likely to be used in the interests of corruption as against it.

Municipal Corporations Act.

Accordingly, when the Augean stable of municipal affairs was cleansed in the year 1835[1], the Legislature made stringent provision against any alienation of municipal lands (except by short leases at rack rents, or by *bona fide* building leases), without the consent of the Treasury, given upon application publicly notified. This policy has been continued by recent legislation; and the result is, that no municipal corporation can, without the consent of the Local Government Board[2], or the authority of an Act of Parliament, sell, mortgage, or alienate any of its corporate land, or grant any lease of it, other than a lease for a term not exceeding thirty-one years without fine, or a lease of buildings or building land, with or without fine, for a term not exceeding seventy-five years[3]. But a clause which has survived from the policy of 1835 permits of the renewal of ancient leases *ad infinitum* on the ancient terms[4]; and this clause, aided by the vagueness of the earlier section, is liable to abuse, and certainly leaves the disposal of valuable corporation leases open to much criticism. Presumably, any alienation made by a municipal corporation in defiance of the provisions of the Act would be *ipso facto* void.

Infants.

Conveyances usually voidable.

2. *Infants.* It seems to have been the rule of the common law, that alienations of land by an infant were *prima facie* valid; but that he was at liberty to set them aside within

[1] 5 & 6 Will. IV. c. 76. § 114.
[2] 51 & 52 Vict. (1888) c. 41. § 72.
[3] 45 & 46 Vict. (1882) c. 50. § 108.
[4] ib. § 110.

a reasonable time after attaining his majority[1]. The uncertainty manifest in some of the older books seems to be due to a confusion of the capacity to alienate with the form of alienation. Doubtless, the consequences of a voidable feoffment or fine differed from those of a voidable grant or other 'innocent' conveyance[2]; but the principle was the same in both cases[3]. Now that a feoffment has ceased to have a tortious operation[4], and that Fines and Recoveries have been abolished[5], the rule on the subject of infants' conveyances is clear. They are in general voidable, not void; and if the infant does not claim specifically to set them aside within a reasonable time after attaining his majority, they will be binding upon him[6].

Exceptions. Gavelkind.

But, in some cases, the alienations of an infant are binding upon him from the first. Thus, by the custom of gavelkind, an infant may make a binding feoffment at any time after attaining the age of fifteen; provided that valuable consideration be given for the feoffment. But the recent decision in *Maskell's and Goldfinch's Contract*[7] shows that the court is unwilling to force upon a purchaser a title dependent upon such a feoffment. Again, an infant heir or devisee may be ordered by the court to convey lands to satisfy the debts of his ancestor or testator[8]; and where an infant is trustee or mortgagee the court may make an order vesting any land to which he is entitled in that capacity, in any such manner as the court may direct[9]. The powers of a tenant for life under the Settled Land Act, 1882, may be exercised by the guardians of an infant tenant in possession, whether the infant is or is not actually a tenant for life[10]. And, by virtue

Conveyance by order of court.

Infant tenant for life.

[1] Co. Litt. 171 b; Perkins, *Profitable Book*, §§ 12, 13, 154; Blackstone, *Comm.* (4th ed.), II. 292.

[2] *Whittingham's* Case (1603) 8 Rep. 42.

[3] See Lord Mansfield in *Zouch* v. *Parsons* (1765) 3 Burr. at p. 1804.

[4] 8 & 9 Vict. (1845) c. 106. § 4. [5] 3 & 4 Will. IV. (1833) c. 74.

[6] *Edwards* v. *Carter*, 1893, A. C. 360; *Zouch* v. *Parsons* (1765) 3 Burr. 1794.

[7] 1895, 2 Ch. 525. [8] 11 Geo. IV. and 1 Will. IV. (1830) c. 47. § 11.

[9] Trustee Act, 1893 (56 & 57 Vict. c. 53), §§ 26, 28.

[10] 45 & 46 Vict. c. 38. §§ 59, 60. This provision renders the clauses of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), §§ 46, 49, as applied

settlements.

of the Infant Settlements Act, 1855, a male infant of twenty, and a female infant of seventeen may, with the sanction of the court, make a binding settlement on his or her marriage [1]. If the settlement comprise a disentailing assurance by the infant, the assurance will be void upon the death of the infant before attainment of majority [2]. But other assurances comprised in the settlement will not be revoked by death [3].

Acquisition by an infant.

Finally, it may be pointed out that an infant is capable of *taking* under an alienation to him of any interest in land. He has, however, the right to repudiate his acceptance on attaining his majority; but the right must be exercised within a reasonable time [4]. For the purpose of accepting an interest, other than a legal estate acquired by inheritance, an infant *en ventre sa mere* is as much in existence as an infant actually born [5].

Married women.

3. *Married women.* In spite of recent legislation, the position of a married woman with regard to the alienation of land is by no means free from difficulty; and when a title is found to depend upon an alienation by a married woman, inquiry into the circumstances is always necessary.

Restraint on anticipation.

For a married woman may be incapable, either by reason of express restriction, or because her case is not within the enabling section of the Married Women's Property Act, 1882, of alienating land in the ordinary way. Thus, it has long been the rule that if, in the instrument by which property is conveyed to a woman, there is contained a clear expression of the donor's intention that she shall not be able to deprive herself of the future enjoyment of the property, she will be unable to effect an alienation of it. This restriction, known as the 'restraint on anticipation,' would, of course, if annexed

by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 41, largely, but not entirely unnecessary.

[1] 18 & 19 Vict. c. 43. § 1. The settlement may be made before or after the marriage (*Lovett* v. *Lovett*, 1898, 1 Ch. 82).

[2] 18 & 19 Vict. c. 43. § 2. [3] *Scott* v. *Hanbury*, 1891, 1 Ch. 298.

[4] Co. Litt. 2 b. *N. W. Ry. Co.* v. *McMichael* (1850) 5 Exch. 114.

[5] *Doe* v. *Clarke* (1795) 2 H. Bl. 399; 10 & 11 Will. III. (1699) c. 16; *Richards* v. *Richards* (1860) Johns. 754.

to a conveyance to a man, be merely void, as tending to fetter that power of free alienation which belongs to owners of property by English law[1]. And, similarly, it will have no effect upon an unmarried woman. But, if such a woman afterwards marry, without having alienated her interest, the restraint on anticipation will then arise, and, if appropriately worded, will revive on subsequent marriages[2]. The effect of a restraint on anticipation by a married woman is not rendered nugatory by the Married Women's Property Act, 1882, either as to previously or as to subsequently married women[3]; but a restraint on anticipation contained in a settlement of her *own* property made by a woman upon or after her marriage will not be valid against her antenuptial creditors, nor will any such settlement have any greater effect as a protection against creditors than a similar settlement made by a man[4]. Moreover, by the provisions of various Acts of Parliament, the court may remove, wholly or partially, a restraint on anticipation attached to the separate estate of a married woman. The principal objects with which such removal may be ordered are as follow:—

(*a*) To secure a benefit to the woman (Conveyancing Act, 1881, § 39[5]).

(*β*) To provide costs incurred by the woman in litigation (Married Women's Property Act, 1893, § 2[6]).

(*γ*) To make good a loss occasioned by her to a trust estate in respect of which she is a beneficiary (Trustee Act, 1893, § 45[7]).

And the powers vested in a married woman as tenant for life under the Settled Land Act, 1882, may be exercised by her notwithstanding the existence of a restraint on anticipation[8].

[1] *Brandon* v. *Robinson* (1811) 18 Ves. Jr. 429.

[2] *Tullett* v. *Armstrong* (1838) 1 Beav. 1. The operation of the restraint will, however, be limited within the period of perpetuity (*Buckton* v. *Hay* (1879) 11 Ch. D. 645).

[3] 45 & 46 Vict. c. 75. § 19.

[4] ib. The operation of these clauses of the Act is prospective only.

[5] 44 & 45 Vict. c. 41.

[6] 56 & 57 Vict. c. 63. § 2.

[7] 56 & 57 Vict. c. 53. § 45.

[8] 45 & 46 Vict. c. 38. § 61.

Alienation where no restraint.

But the more important question remains—what are the powers of a married woman in respect of alienation, where the restraint against anticipation does not apply? At the common law, a married woman was personally incapable of binding herself by any conveyance or alienation made during coverture, whether with her husband's concurrence or without. As regards personal property in possession, this incapacity was immaterial, inasmuch as a wife's chattels passed, on her marriage, to her husband. But, as regarded her land and reversionary interests in personalty, the incapacity caused great inconvenience; for neither husband nor wife could make a good title to these. Accordingly, at a very early date, the process of fictitious lawsuit was applied to effect an alienation of the wife's lands; and by the levying of a Fine, in which she was examined apart from her husband to ascertain that her concurrence was genuine, her lands could be effectually alienated[1]. For this process, which was expensive and complicated, the Fines and Recoveries Act, 1833[2], substituted an ordinary deed of grant or other conveyance, separately acknowledged by the married woman before a judge[3], a master in chancery, or two commissioners appointed by the court, either for the special case or generally to take such acknowledgements[4]. And this form of conveyance, which was extended by Malins' Act to reversionary interests in personalty belonging to a married woman[5], is still the only form of conveyance which can safely be used, in cases in which the property to be conveyed is not quite clearly the 'separate property' of the married woman.

Fines and Recoveries Act.

Malins' Act.

Separate estate.

As regards the latter species of property, it will be remembered that it was originally the creation of the Court of Chancery, which, by a series of decisions, gradually established the doctrine, that the property of a married

[1] Co. Litt. 38a b.

[2] 3 & 4 Will. IV. c. 74.

[3] Including now a County Court Judge (County Courts Act, 1888, 51 & 52 Vict. c. 43. § 184).

[4] One such commissioner is now sufficient. (Conveyancing Act, 1882, 45 & 46 Vict. c. 39. § 7).

[5] 20 & 21 Vict. (1857) c. 57.

woman might, if limited to her in appropriate terms, be enjoyed and dealt with by her, independently of her husband, much in the same way (but not entirely) as if she were a *feme sole*. Amongst the other powers of enjoyment recognized as belonging to a married woman in respect of her separate property, was the power of alienation, which could be exercised by her, directly or indirectly, by ordinary instrument *inter vivos* or by Will, except that the legal estate in land could not be directly conveyed by her [1]. The latter restriction was, however, not very important, as the court would hold her alienation of the equitable interest binding as against every one but a purchaser for value and in good faith of the legal estate, and would, if necessary, constitute the husband himself a trustee for the purpose.

Statutory separate estate.

To the separate property which could be acquired by a woman married before August 9, 1870, the Married Women's Property Act of that year added, as we have seen [2], certain items, and thus commenced the history of what may be called the 'statutory separate estate' of the married woman. But the Act of 1870 did not, nor did its amendment in 1874 [3], contain any provision as to the power of alienation of her separate estate by a married woman, which therefore remained in the position accorded to it by the decisions of the Court of Chancery. But the Married Women's Property Act, 1882, not only added largely, as we have seen [4], to the separate estate itself, but expressly enacted that, in respect of her separate property, a married woman should be capable of disposing of the same, 'by Will or otherwise,' in the same way as a *feme sole* [5]. This clause finally disposes of any question of the capacity of a married woman to dispose, by ordinary methods, of any property which is unquestionably 'her separate property,' and leaves only the question—'what

[1] *Taylor* v. *Meads* (1865) 34 L. J. (N. S.) Ch. 203. The alienation of the separate estate did not, even after 1833, require the formalities of the Fines and Recoveries Act (*Pride* v. *Bubb* (1871) L. R. 7 Ch. App. 64).

[2] Ante, p. 273. [3] 37 & 38 Vict. c. 50. [4] Ante, p. 274.

[5] 45 & 46 Vict. (1882) c. 75. § 1 (1).

is her separate property?,' a question as to which some differences of opinion appear to prevail. Thus, it was held that property acquired by a woman after the death of her husband was not her 'separate property' in the sense that it would pass by a Will made during coverture[1]. But this decision has been expressly overruled by statute[2]. It has, however, quite recently been ruled, that an interest in land of which a married woman is seised as an active trustee is not her 'separate property,' and cannot pass by an ordinary conveyance, executed by her as a *feme sole*[3]. But a married woman who is a 'bare trustee,' i. e. a trustee with no active duties to perform, may convey, as a *feme sole*, any freehold or copyhold hereditament vested in her as such trustee[4].

Liability for debts.

Finally, it may be remarked that, notwithstanding the existence of section 1 of the Married Women's Property Act, 1893[5] (perhaps because of the peculiar wording of that section), some doubt still appears to prevail as to the nature of the contractual liabilities of a married woman. But it is submitted that the rule is simple. The debts of a married woman can be enforced against any separate property which she may happen to have at the time when the creditors' claims are established, whether such property belong to her by virtue of settlement or otherwise[6]. And, if they be antenuptial debts, they will be so enforceable, notwithstanding any restraint on anticipation imposed by the woman herself, while her settlements may be set aside on the ground of fraud upon creditors, in the same way as those of a man[7]. But the ordinary debts of a married woman do not, it is conceived, any more than those

[1] *In re Price* (1885) 28 Ch. D. 709.

[2] Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), § 3.

[3] *Harkness' and Allsopp's Contract*, 1896, 2 Ch. 358.

[4] Trustee Act, 1893 (56 & 57 Vict. c. 53), § 16. A mortgagee who has received principal, interest, and costs, is not, according to Kekewich, J., a trustee at all; and a married woman occupying such a position in respect of her separate estate can, therefore, convey under the general powers of the Act of 1882 (*Brooke's & Fremlin's Contract*, 1898, 1 Ch. 647).

[5] 56 & 57 Vict. c. 63. § 1. [6] 45 & 46 Vict. (1882) c. 75. §§ 1 (*a*), 19.

[7] ib. § 19. As to this see post, pp. 293–6.

of a man, constitute an incumbrance upon her title to lands, in the sense that they will be enforceable against a *bona fide* purchaser for value.

Convicts.

4. *Convicts.* It was long the rule of law, that the lands of a person duly attainted of treason or felony should be forfeited, either to the king or the next lord of the fee, as from the date of the commission of the offence [1]. A similar consequence followed, where the tenant was ordered to abjure the realm, and where he was outlawed. Forfeiture for treason and felony having been abolished, as well as the process of outlawry itself in civil cases, and abjuration being obsolete [2], there remains only the possible, but extremely improbable contingency of outlawry on a criminal charge, to affect a title to lands on the ground of crime. But, though a convict is not deprived of his lands by his sentence, he is, if adjudged guilty of treason or felony, and sentenced either to death or penal servitude, rendered legally incapable of alienation or contract, during the continuance of the sentence [3]. The custody and management of the property of such a convict may be committed to an administrator appointed by the Crown; and the administrator has power to alienate any such part of the property as he may think fit [4]. In default of an administrator, an interim curator may be appointed by justices in petty sessions; but the powers of an interim curator are confined to the maintenance of the property *in statu quo*, except that, with the special leave of the court, he may alienate personal property, which probably includes leaseholds [5]. Upon the completion of the convict's sentence, or his pardon or death, his property reverts to him or his representatives, as the case may be [6]; and the disabling sections of the Forfeiture Act, 1870, do not apply to property acquired by a convict whilst lawfully at large [7], nor to property held by him as a trustee [8].

[1] See ante, pp. 9–10.
[2] See ante, p. 10.
[3] 33 & 34 Vict. (Forfeiture Act, 1870), c. 23. § 8.
[4] ib. §§ 9, 12.
[5] ib. §§ 21, 24, 25.
[6] ib. § 18.
[7] ib. § 30.
[8] 56 & 57 Vict. (Trustee Act, 1893), c. 53. § 48. But a new trustee may be appointed in the convict's place (ib. § 25 (1)).

Lunatics. 5. *Lunatics.* After some conflict of opinion, it seems to be now the rule of law, that a purchaser for value from a lunatic, whom he did not and had no reason to know was such, acquires a good title [1], but that a voluntary conveyance by a lunatic is absolutely void [2]; while a conveyance for value to a purchaser who is aware of the vendor's insanity is voidable by the latter or his committee, or by his representatives after his death [3]. It is, however, a curious but apparently recognized rule, that a man formally found a lunatic by inquisition not superseded, may make a valid Will during a lucid interval [4].

Drunkards. The rules with regard to the capacity of drunken persons, who may be regarded as temporarily insane, appear to be much the same as those affecting lunatics. In favour of a *bona fide* purchaser for value, i. e. a purchaser who did not know and had no reason to know of the state of the vendor, a conveyance by a drunken person is valid [5]; but as against a volunteer, or a person who took with notice of the alienor's condition, it is voidable [6]. And a Will executed by a person so drunk as not to be capable of understanding and weighing the consequences of his act, is absolutely void [7].

It is abundantly clear, therefore, that a purchaser cannot safely take a conveyance from a man whom he knows to be suffering from mental incapacity. And, in the ordinary way, it is not intended by the law that a lunatic should have power by any means, or any one for him, to alter the condition of his property, at least so far as beneficial interests are concerned [8]. But there are certain cases in which it is inevitable

[1] *Molton* v. *Camroux* (1849) 4 Exch. 17; *Niell* v. *Morley* (1804) 9 Ves. Jr. 478.

[2] *Elliott* v. *Ince* (1857) 7 De G. M. & G. 475; *Thompson* v. *Leach* (1695) 1 Ld. Raymond, 313.

[3] See the judgement of Fry, L. J., in *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.

[4] *Roe* v. *Nix*, 1893, P. 55.

[5] The older cases went even further. See *Johnson* v. *Medlicott* (1734) 3 P. Wms. 130 n. and *Cooke* v. *Clayworth* (1811) 18 Ves. Jr. 12.

[6] *Matthews* v. *Baxter* (1873) L. R. 8 Exch. 132.

[7] Clearly implied in *Handley* v. *Stacey* (1858) 1 Fost. & Fin. 574.

[8] Lunacy Act, 1890 (53 & 54 Vict. c. 5), § 123.

or, at least, extremely desirable, that such a change should be made. Thus, property may be vested in a lunatic trustee, and it may be necessary for the performance of the trust that it should be alienated. Mortgages vested in a lunatic may be paid off, and reconveyances required. A railway company may claim to purchase the lands of a lunatic under its compulsory powers. Accordingly, by the Lunacy Act, 1890 [1], the committee of the estate of a lunatic is empowered, with the authority of the Judge in Lunacy, to perform any act of alienation in respect of the property of the lunatic which may be deemed necessary or desirable. The capacity of the committee extends to the exercise of powers vested in the lunatic as trustee, including the power of appointing new trustees [2], and of the powers of a tenant for life under the Settled Land Act, 1882 [3]; but any land actually vested in a lunatic by way of trust or mortgage may, by order of the Judge in Lunacy, be directly vested in any other person for such estate and in such manner as the Judge directs [4]. A committee of a lunatic's estate can only be appointed where the lunatic has been so found by inquisition; but in other necessary cases the Judge in Lunacy may appoint a person to exercise the powers of a committee [5].

It is believed that this concludes the list of persons legally unable, from inherent incapacity, to exercise the powers of alienation normally belonging to every person in whom an interest in land is vested. Special circumstances affecting capacity in particular cases, such as the application of fraud and duress, fall under the equitable jurisdiction of the court, and may be deemed grounds for treating alienations as void or voidable. But the consideration of such cases does not fall within the scope of this work [6]. We have now to deal with

[1] 53 & 54 Vict. c. 5. §§ 120, 124. (For form of conveyance by the committee of a lunatic, see Renton, *Lunacy*, p. 1062.)

[2] ib. §§ 128, 129.

[3] 45 & 46 Vict. c. 38. § 62.

[4] Lunacy Act, 1890 (53 & 54 Vict. c. 5), § 135.

[5] ib. § 116.

[6] A very curious case of statutory incapacity, abolished only in 1897, was created by the 32 Hen. VIII. (1540) c. 9, which prohibits alienations

the second class of restraints on alienation, viz. those which arise from the illegality of the objects contemplated by the parties.

Illegality of object.

B. *Exceptions arising from illegality of object.*

Mortmain.

1. *Mortmain.* Notwithstanding the clear differences in history and character between the two subjects, there is a tendency, both in Acts of Parliament and text-books, to treat mortmain and charitable assurances as though they fell within the same rules. It is essential to distinguish accurately between the two. Any assurance of land to a corporation, whatever be the ulterior object of the assurance, is an alienation in mortmain, and, as such, if it be not made in pursuance of a licence granted by Her Majesty, causes a forfeiture of 'the land,' by which, presumably, is meant the interest attempted to be alienated [1]. To this general rule important statutory exceptions exist; and many corporations have by charter or custom a general or partial licence to acquire lands in mortmain [2]. Until the year 1891, an assurance of money charged upon or arising from land was an assurance of 'land' within the meaning of the Mortmain Acts; but this extensive interpretation no longer holds good [3]. A licence in mortmain is not required for an assurance of land for any of a long list of public objects, the particulars of which it would be impossible here to mention [4]; but the general result of the law on the subject is that an alienation to a corporation

of land of which the alienor or his predecessor in title has not been in possession for a year previous to the alienation. The section, which was aimed at strengthening the law of maintenance and champerty, had long ceased to be regarded in practice. Its literal interpretation would have made sales of future interests almost impossible; for, in spite of the words of the section, it is difficult to see how a man could have been in possession of a remainder or a reversion.

[1] Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), §§ 1, 2. As to the person entitled to take advantage of the forfeiture, see ante, p. 218.

[2] The effect of these licences is expressly preserved by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), § 12.

[3] Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), § 1.

[4] See a list of these in *Index to the Statutes in Force*, Tit. Mortmain, 2.

prima facie works a forfeiture. Any exception must be clearly proved.

2. *Charitable uses.* An assurance of land, even though made to non-corporate persons, was, until recently, *prima facie* irregular, if it contemplated the devotion of the land [1] or the proceeds of it to a charitable purpose, unless the assurance were made in a particular form [2]. But the effect of the irregularity was merely to render the attempted assurance inoperative, not to work a forfeiture; and herein it differed completely from the effect of an assurance in mortmain [3]. The object of the special forms was, undoubtedly, to secure a fair and impartial consideration of the consequences of the assurance by the alienor, uninfluenced by circumstances likely to cause a hasty determination. The rules laid down by the Mortmain and Charitable Uses Act [4], for an assurance to charitable objects, are as follow:— Charities.

(*a*) It must be made to take effect in possession immediately, without power of revocation or other provision for the benefit of the assurer, except such provisions as are expressly authorized by the Act [5].

(*β*) It must be made by deed executed in the presence of two witnesses [6].

(*γ*) It must, unless made in good faith for full and valuable consideration, be executed at least twelve months before the death of the assurer [7].

[1] The same interpretation applies to the word in charitable as in mortmain assurances. (See ante, p. 290.)

[2] 9 Geo. II. (1736) c. 36.

[3] Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), § 4 (1).

[4] ib. § 4 (2)–(9).

[5] The Act authorizes (§ 4 (4)) the reservation of (i) a nominal rent, (ii) mines and minerals, (iii) easements, (iv) building covenants, and, where the assurance is made 'in good faith on a sale for full and valuable consideration,' (v) a substantial rent, rent-charge, or annuity.

[6] This provision does not apply to copyholds.

[7] It is very difficult to discover the meaning to be attached to the words 'in good faith.' Presumably they do not mean that the vendor is to be ignorant of the object of the purchase.

(δ) It must be enrolled within six months after its execution in the central office of the Supreme Court [1].

Act of 1891.

But these provisions of the Act of 1888 have been greatly modified by the amending Act of 1891 [2], which authorizes the assurance *by Will* of land for charitable purposes, without any restrictions as to amount, date of execution, or formality, other than the formalities required by the Wills Act. Inasmuch as, previously to 1891, land could not be devised at all for charitable purposes [3], it is obvious that the recent statute has effected a complete change of policy. But the tying up of land devised for charities is still prohibited by the clause of the Act [4] which directs, that all such land shall be sold within a year of the testator's death, or such extended period as the court may allow. Any land not so sold vests in the official trustee of charity lands, and must forthwith be sold under the direction of the Charity Commissioners, for the benefit of the charity [5]. A bequest of personalty to a charity, accompanied by a direction to invest in land, will be treated as a bequest of the personalty unfettered by such direction [6]. But where any land devised to a charity, or directed to be purchased with a bequest, is required for actual occupation by the charity, the court or the Charity Commissioners may sanction the retention or acquisition of such land [7]. The Act of 1891 only applies to the Wills of persons dying after August 4, 1891 [8]; but it applies to them whether they were executed before or after the passing of the Act [9].

What is a 'charity'?

The large question, as to what constitutes a 'charity' within the meaning of the statutes, cannot be entered upon here at any length. The question was discussed in a very

[1] There are certain provisions (see § 5) applicable to the case of omission to enrol. It seems doubtful if these cover any cases but those in which the assurance has been made 'for full and valuable consideration.'

[2] 54 & 55 Vict. c. 73. § 5.

[3] This was the logical consequence of the 9 Geo. II. (1736) c. 36, which prescribed special formalities for charitable assurances.

[4] 54 & 55 Vict. (1891) c. 73. § 5. [5] ib. § 6. [6] ib. § 7.

[7] ib. § 8. [8] ib. § 9. [9] *Re Bridger*, 1894, 1 Ch. 297.

recent case [1]; and the conclusion arrived at appears to be, that any assurance tending to (? intended for) the benefit of the community at large, or any considerable portion of it, is an assurance for charitable purposes. The distinction between a private and a charitable trust probably turns upon the number of beneficiaries contemplated; but the precise limits of each have never been settled [2].

Exceptions to the general rule.

As in the case of assurances in mortmain, a large number of statutory exceptions have been grafted on the general rule, which prohibits alienation for charitable purposes except in the forms permitted by the Acts of 1888 and 1891. The more important of these are enumerated in the Act of 1888 [3], and comprise gifts for public recreation and educational objects, gifts to the universities and the three favoured public schools, and gifts of sites for literary and scientific institutions. Care must be taken to distinguish between those exceptions which apply to the mortmain as well as to the charitable provisions of the Act, and those which apply to the charitable provisions only [4]. The special clauses in the Act of 1888, authorizing the gift of land by Will in favour of specially named charities, have been rendered unnecessary by the Act of 1891 [5]. But the clauses affecting assurances *inter vivos* are still in force.

Fraud upon creditors.

3. *Fraud upon creditors.* We have already considered [6] the liability of a voluntary settlement to be set aside on the subsequent bankruptcy of the settlor. But a more general liability has long existed by virtue of a well-known statute passed in the year 1571 [7]; and, though a creditor seeking to set aside a conveyance of his debtor's property, has frequently the choice of proceeding either in bankruptcy or under the statute of 1571, it sometimes happens that the remedy in bankruptcy is not open

[1] *Re Foveaux*, 1895, 2 Ch. 501. In the earlier part of his judgement, Chitty, J., lays stress (p. 504) on the tendency of the gift. Later on (p. 507) he appears to rely more on the intention of the assurer.

[2] See *A.-G.* v. *Pearce* (1740) 2 Atk. 87; 'it is the extensiveness which will make it a public one' (Lord Hardwicke). *Goodman* v. *Mayor of Saltash* (1882) 7 A. C. 633.

[3] 51 & 52 Vict. c. 42. §§ 6-8.

[4] Cf. e.g. §§ 6, 7.

[5] *Re Hume*, 1895, 1 Ch. 422.

[6] Ante, pp. 249-50.

[7] 13 Eliz. c. 5.

to him. For example, the conveyance may have been made by a married woman, who (except in special circumstances) cannot be made a bankrupt. Or it may have been made too long ago to be covered by the terms of the Bankruptcy Act.

The statute of 1571 (which was made perpetual by another statute of the year 1586 [1]), is very wide in its terms, and provides, in effect, that any alienation of land or chattels, and every obligation incurred, with the intent of hindering or defrauding creditors *or others* in the pursuit of their lawful claims, shall be utterly void as against the persons who are or might be hindered or defrauded by them [2]. This generality of expression has, not unnaturally, given rise to a multitude of interpretations, and the simplest way to deal with the subject will be, to state in the form of brief rules the leading results of the decisions upon the statute. It will be understood, of course, that, in a work like the present, only the outlines of the topic can be drawn.

Fraudulent intent.

(i) *The fraudulent intent required by the statute may be proved either by direct or indirect evidence.* It may be possible for the plaintiff to show, by the ordinary methods of evidence, that the conveyance in question was deliberately intended, by the alienor or the alienee, to delay creditors. Thus, the maintenance of secrecy in the transaction [3], the retention of possession by the alienor [4], may, unless satisfactorily explained [5], amount to evidence of fraud. *A fortiori*, proof of the actual expression of intent by either party would be sufficient. But, if the conveyance were voluntary, or upon an utterly inadequate consideration, it will, if in fact it tended to defeat creditors, be treated as fraudulent, although in fact no fraudulent intent be proved [6].

Creditors capable of being injured.

(ii) *There must be actually existing, or in immediate contemplation, at the date of the conveyance, creditors capable of*

[1] 29 Eliz. c. 5. [2] 13 Eliz. c. 5. § 1. [3] *Twyne's* Case (1601) 3 Rep. 80 b.
[4] *Edwards* v. *Harben* (1788) 2 T. R. 587.
[5] *Latimer* v. *Batson* (1825) 4 B. & C. 652; *Martindale* v. *Booth* (1832) 3 B. & Ad. 498.
[6] *Spirett* v. *Willows* (1863) 3 De G. J. & S. 293.

being injured by it. This rule appears to be the natural result of the wording of the statute. *Prima facie,* a man cannot be held to have the intent to defraud non-existent creditors. But it has for some time been established, that if a man, at the time of making a conveyance, contemplates the immediate incurring of liabilities, e.g. by embarking in business, any creditors who may in fact become such in that way, will be considered as having existed at the date of the conveyance[1]. And, further, in the case of a *voluntary* conveyance, the actual contemplation of creditors is not necessary to bring the conveyance within the statute[2].

Conveyances for value.

(iii) *A conveyance for value can only be impeached under the Act if, at the time when the action is brought, there are creditors in existence who were also such at the date of the conveyance*[3]*; otherwise of a voluntary conveyance*[4]. But, although the existence of creditors who were such at the date of the conveyance is essential to an action to impeach a conveyance for value, the action may be brought by a creditor who has become such since the date of the conveyance[5].

Participation in fund.

(iv) *But a fund recovered by setting aside a conveyance under the statute is available for all existing creditors, independently of the dates at which their debts were incurred*[6]. This rule, which does not logically follow from the words of the statute, is probably the result of the preference, shown by creditors seeking the aid of the statute, for the procedure of a court of Equity. Claims arising out of the statute have always been enforceable at law; but, as a fact, creditors have preferred to sue in Equity. And the principle that 'equality is equity' has, therefore, prevailed.

Who are 'creditors'?

(v) *The remedy on the statute is not confined to 'creditors'*

[1] *Mackay* v. *Douglas* (1872) L. R. 14 Eq. 106.

[2] *Freeman* v. *Pope* (1869) L. R. 9 Eq. 206.

[3] *Re Tetley* (1896) 66 L. J. (N. S.) Q. B. 111; affirmed on appeal.

[4] *In re Pearson* (1876) 3 Ch. D. 807.

[5] *Jenkyn* v. *Vaughan* (1856) 3 Drew. 419. This was a voluntary conveyance, but the reasoning applies.

[6] *Reese River Silver Mining Co.* v. *Atwell* (1869) L. R. 7 Eq. 347.

in the ordinary sense of the term. Thus, the Crown having a contingent claim to forfeiture[1], and volunteers[2], can claim under it.

Laches. (vi) *The rights created by the statute are legal, not equitable. They cannot, therefore, be defeated by mere laches.* Where a right is purely the creature of Equity, its enforcement is in the discretion of the court, and may be withheld or modified according to the merits of the case. But a legal right can only be destroyed or barred by strictly legal methods[3]. Presumably, a right to set aside a conveyance of land under the statute would be barred by the lapse of the statutory period of twelve years from its execution.

Purchasers for value (vii) *The rights of purchasers in good faith and for valuable consideration are specially protected by the statute*[4]. Therefore, although a conveyance be intended by the alienor to defraud creditors, yet, if the purchaser give value and act *bona fide*, it will be protected[5]. And, even if the original conveyance be impeachable, a sub-purchaser who fulfils the conditions of the section will be safe[6]. But the two conditions must concur. Valuable consideration without *bona fides* is not sufficient, nor *bona fides* without consideration[7].

Voluntary conveyances. 4. *Fraud upon purchasers.* A few years after the passing of the Act of 1571, another statute was directed against fraudulent conveyances. This is the 27 Eliz. c. 4[8], passed in the year 1584, which provided, that every conveyance of an interest in land made with intent to defraud persons who should have purchased or should thereafter purchase such lands (i. e. any interest in such lands), should be deemed void against such purchasers and all others claiming under them[9]; and, in particular, that a conveyance made with a clause of reservation, determination, or alteration, should

[1] *Pauncefoot* v. *Blunt* (1593) in *Twyne's* Case (1601) 3 Rep. 80 b.
[2] *Adames* v. *Hallett* (1868) L. R. 6 Eq. 468.
[3] *Re Maddever* (1884) 27 Ch. D. 523. [4] 13 Eliz. (1571) c. 5. § 6.
[5] *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505. This case was decided on the Bankruptcy Act, but the words in each case are substantially the same.
[6] *Halifax Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31.
[7] *Twyne's* Case (1601) 3 Rep. 80 b.
[8] Made perpetual by 39 Eliz. (1597) c. 18. [9] 27 Eliz. (1584) c. 4. § 2.

be deemed fraudulent and void against subsequent purchasers of the same lands from the same vendors [1]. In the Act, the term 'purchaser' is confined to acquirers for 'money or other good consideration,' i. e. purchasers for value [2]; but nothing is said about the *bona fides* of such purchasers. There is, however, a proviso that conveyances made to *bona fide* purchasers for good consideration [3] shall not be deemed fraudulent, even though made with fraudulent intent by the vendor [4].

It is, at first sight, somewhat difficult to realize what protection is afforded by the statute of 1584, that is not equally afforded by the earlier statute of 1571, the advantages of which are available to 'creditors and others.' It is true that the later statute expressly includes a revocable conveyance within its definition of fraudulent assurances; but it is probable that a similar result would have been arrived at by interpretation of the 13 Eliz. c. 5. The real value of the 27 Eliz. c. 4, is derived from an interpretation put upon that Act soon after its passing, by which interpretation *all* voluntary conveyances were rendered fraudulent against subsequent purchasers for value from the same vendor [5]. This interpretation, audacious as it may at first sight appear, is not essentially unreasonable, regard being had to the wording of the fourth section of the Act, which only protects conveyances made *bona fide* and for value. But a genuine addition to the terms of the statute does appear to have been introduced by the decision quoted by Anderson, C. J., in *Twyne's* Case [6], which refused to treat a voluntary conveyance as void against a subsequent purchaser who, though he had given valuable consideration, did not act *bona fide*.

[1] 27 Eliz. (1584) c. 4. § 5. [2] ib. §§ 2, 5.

[3] In both these statutes of Elizabeth the phrase 'good consideration' has, from the first, been interpreted to mean 'valuable' (i. e. pecuniary) 'consideration' (*Upton* v. *Basset*, 1595, Cro. Eliz. 444).

[4] 27 Eliz. (1584) c. 4. § 4.

[5] *Doe* v. *Manning* (1807) 9 East. 59, and earlier cases there quoted. It is evident that the doctrine must have been older than the limitation introduced into it by the decision alluded to in *Twyne's* Case.

[6] Ann. 1601, 3 Rep. 83 b.

Voluntary Conveyances Act, 1893.

The importance of this interpretation is, however, largely diminished by the Voluntary Conveyances Act, 1893[1], which provides that a voluntary conveyance shall not, if in fact made *bona fide* and without fraudulent intent, be deemed fraudulent under the statute of 1584, by reason of any subsequent conveyance for value made after the passing of the Act[2]. But, of course, a purchaser claiming relief against any previous conveyance, whether voluntary or not, on the ground that it was made with fraudulent intent, can still avail himself of the provisions of the statute. And the rule, as it affects revocable conveyances, is untouched by recent legislation.

Other illegal objects.

In addition to the instances quoted, there are many in which, on equitable grounds, a conveyance apparently valid may be subsequently set aside. Thus, any conveyance made to effect an immoral, impolitic, or illegal object may be impeached, and so also a conveyance made upon illegal consideration. But these conveyances differ from those which have been previously discussed, by reason of the fact that they are, as a rule, voidable only, and not void. That is to say, the court before which they are impeached[3], exercises considerable discretion as to the terms upon which it will rectify or set them aside; with the important result, that persons untainted with knowledge of or responsibility for the defect, will usually be protected in any judicial dealings with an obnoxious conveyance. Where, however, a conveyance, as by the Mortmain Act or the statutes of Elizabeth, is made void at law, no allowance can be made for innocent takers, which is not expressly made by the statute itself.

[1] 56 & 57 Vict. c. 21. [2] June 29, 1893.

[3] This court is, *prima facie*, the Chancery Division of the High Court. Judicature Act, 1873 (36 & 37 Vict. c. 66), § 34 (3).

CHAPTER XVIII.

FEOFFMENT, LEASE AND RELEASE, AND GRANT.

Feoffment.

When the History of English Conveyancing comes to be written, the Feoffment will occupy an honourable place in its pages. From the time at which our land law assumed its definite shape in the thirteenth century, until the practice of conveyancers was revolutionized by the Statute of Uses, it was the normal assurance of freehold interests in land, whether held by military or by socage tenure. Fines and Recoveries were, in truth, but evasions of a recognized rule; the clumsy conveyance by Lease with entry, followed by Release, was only possible or advantageous in special cases. Even after the Statute of Uses[1] and the Statute of Wills[2] had opened up new worlds to the conveyancer, the feoffment still remained the orthodox assurance of the common law. The language of Coke, usually so crabbed and turgid, rises into something like dignified simplicity as he speaks of its powers. The feoffment is 'the ancient and the most necessary conveyance, both for that it is solemn and public, and therefore best remembered and proved, and also for that it cleareth all disseisins, abatements, intrusions and other wrongful or defeasible estates[3].' Coke speaks of Ephron as enfeoffing Abraham of the field of Machpelah[4]; being, apparently, of opinion, that the medieval feoffment was a direct descendant

Coke on feoffments.

[1] 27 Hen. VIII. (1535) c. 10.
[2] 32 Hen. VIII. (1540) c. 1.
[3] Co. Litt. 9 a.
[4] ib.

of the ceremonies employed on that occasion. Without entering into this interesting antiquarian speculation, it may be sufficient to say, that the feoffment is essential to the feudal view of a freehold estate, which is, that it is an interest in land of which the holder is *seised*, i. e. corporeally possessed, by virtue of a gift from a superior. A feoffment is, as the language of medieval writers warrants us in saying, a *livery* (or delivery) of seisin, i. e. an actual corporeal transfer of possession. By the common law, no documentary evidence was necessary to render a feoffment valid; although from very early times prudence suggested that the transaction should be recorded in a subsequently executed charter or deed[1]. But, though no written conveyance was necessary, it was necessary that the livery should be intended to pass a freehold tenement, and if it was intended to pass more than a life estate, the appropriate words of inheritance had to be added[2]. Neither the copyholder nor the tenant for years can convey or take, as such, by feoffment; nor can any interest less than an estate in possession—e. g. an equitable interest, a servitude or a remainder—pass by feoffment. On the other hand, until the 'tortious' operation of a feoffment was abolished in 1845[3], every feoffment operated to confer an estate, albeit the feoffor had no lawful title. For, if the feoffor were actually seised, his seisin at least passed; if he were not, he could not, in fact, deliver seisin.

Tortious operation of a feoffment.

At the present time, it must be confessed, the feoffment plays but a small part in conveyancing. The blows inflicted on its popularity by the statutes of Henry VIII, which

[1] The merely evidentiary (as distinct from dispositive) character of a charter of feoffment is shown by the fact, that the wording always describes a past transaction ('Sciatis me . . . dedisse et concessisse'). See example given in Digby, *Real Property*, cap. i. § 2.

[2] We are informed by Littleton (§ 57) that legal purists only used the word 'feoffment' to cover a conveyance in fee simple. For the creation of an estate tail, 'gift' was the proper word; for a life estate, the word 'lease.' But 'feoffment' originally included all conveyances by livery of seisin.

[3] 8 & 9 Vict. c. 106. § 4.

rendered the secret conveyance at last possible, were followed by other attacks. The Statute of Frauds[1] provided that interests in land created by 'livery and seisin' only, without writing, should be taken to have the force and effect of estates at will only; and this provision was supplemented by the Act to amend the law of Real Property[2], which rendered all feoffments void at law unless evidenced by deed. Thus the charter, which had previously been a mere optional means of proving the existence of a feoffment, became, in fact, the important part of the conveyance, while the livery of seisin sank into a mere solemnity. From the operation of the Act of 1845 was, however, excepted the case of a feoffment by an infant under a special custom; and of this exception use is now occasionally made, when an infant desires to convey gavelkind lands[3]. In other cases, a formal livery of seisin would merely add an element of publicity to a conveyance which it may be desired to keep secret. But it is worthy of note, that the disuse of the feoffment is largely responsible for the agitation in favour of registration of title; although a Land Registry is not by any means the same thing as a Register of Seisins.

Statute of Frauds.

Real Property Act.

As has been stated, the first great blow to the importance of the feoffment was dealt by the Statute of Uses[4]. We have seen, in a previous chapter, that the avowed object of the statute was to convert equitable interests into legal estates, by providing that where *A* was seised to the use of *B*, the latter should be deemed legally seised of the interest which *A* held to his use. But, as the statute made no provision regarding the way in which uses could be declared, and as the Court of Chancery had allowed the creation of uses to be effected by mere word of mouth, and even by implication[5], it was at once perceived by conveyancers, that

Statute of Uses.

Oral secret conveyances.

[1] 29 Car. II. (1677) c. 3. § 1. [2] 8 & 9 Vict. (1845) c. 106. § 3.

[3] The Statute of Frauds made no exception in favour of infants; presumably, therefore, an infant's feoffment must be evidenced by writing. (See *Maskell's & Goldfinch's Contract*, 1895, 2 Ch. 525.)

[4] 27 Hen. VIII. (1535) c. 10. [5] Co. Litt. 271 a.

the door was at last open for that long-desired institution, the secret conveyance of lands. For if *C* enfeoffed *A* to the use of *B*, the conveyance, though notorious as regarded *A*, the mere formal transferee, was (or might be) absolutely secret as regarded *B*, the beneficial taker. And whereas, before the statute, *B* would merely have been an equitable beneficiary, protected by the Court of Chancery, by the effect of the statute he became legal owner, entitled to enforce his rights in a court of law.

Covenant to stand seised.

This was not all. The case just put supposes the transfer of seisin or possession from *C* (the feoffor) to *A* (the feoffee). But there is no real necessity for this cumbrous procedure. If, before the statute, *C*, without any livery of seisin, had merely covenanted for good consideration [1] to stand seised to the use of *B*, the Court of Chancery would have treated *B* as equitable owner, or *cestui que use*, of the lands, to the extent of the interest which *C* had covenanted to stand seised of for *B*.

Bargain and sale.

And if *C*, in consideration of money or other value, had agreed to sell any interest in land to *B*, or, as the language of the courts was, had 'bargained and sold' land to *B*, then the Court of Chancery would, as in the case of a covenant to stand seised, have treated *B* as equitable owner, or *cestui que use*, of the interest agreed to be sold.

Uses with and without transmutation of possession.

By these two methods, the Covenant to stand seised, and the Bargain and Sale, a use could be created before the statute, not merely without livery of seisin to the *cestui que use*, but without livery of seisin to any one. Hence arose the distinction between creation of uses *without transmutation of the estate* (i. e. of the possession [2]) and creation of uses with such transmutation. Now the Legislature might have submitted to a construction of the Statute of Uses which authorized the latter process, but it was not prepared to face

[1] As to this arrangement, see post, p. 304.

[2] The older writers (e. g. Coke, *Littleton*, 271 b) speak of 'transmutation of the estate'; the more modern (e. g. Saunders, *Uses*, 99) adopt the phrase 'transmutation of possession.' The difference is a significant, because unconscious, testimony to the true character of an 'estate.'

the prospect opened up by the former. And, accordingly, no sooner was an attempt in that direction made, than the Legislature interposed with a second statute, known as the Statute of Inrolments[1], passed only a few months after the Statute of Uses[2]. This statute provided, that no estate of *inheritance or freehold* should pass, or any use thereof be made, by reason only of a Bargain and Sale, unless the Bargain and Sale should be made by indenture sealed, and inrolled within six months of its date, in one of the King's Courts of Record at Westminster, or in the county wherein the lands affected should lie[3]. Statute of Inrolments.

The effect of this statute, where it applied, was to substitute for the notorious conveyance by livery of seisin a new kind of conveyance, by registered deed. And although, as the event proved, the statutory conveyance was not popular, it sanctioned a really substantial step towards the ideal of secret conveyances, for the mere registration of a deed, more especially where there is no public right of inspection[4], is not by any means the same thing as a public corporeal transfer. Moreover, in two important points the statute was defective.

(i) *Voluntary limitations of uses.* The Court of Chancery had adopted, quite naturally, the doctrine that a Bargain and Sale implies a pecuniary or 'valuable' consideration[5]. Whatever else it may be, an arrangement which contemplates a Settlements.

[1] 27 Hen. VIII. (1536) c. 16.

[2] There appears to be considerable uncertainty about the dates of these statutes, the Journals for the years being undiscoverable. But in the Rolls of Parliament the Statute of Uses is quoted as of the 'First Part' (? session) and the Statute of Inrolments as of the Second.

[3] Exception was made of lands being within a city borough or town corporate having its own system of inrolment. This hint ought to be followed up by students of legal history.

[4] 'Every party that hath to do therewith.' 27 Hen. VIII. (1536) c. 16. § 2.

[5] Coke, 2nd Inst. 672. In later days it was held that the expression of valuable consideration, not the payment of it, was the essential point. And if the expression was used, no evidence could be brought to disprove it. *Mildmay's* Case (1584) 1 Rep. 176 a; *Fisher* v. *Smith* (1599) Moore, 569. But if valuable consideration were really paid, though not expressed in the deed, the defect may be supplied in the pleadings. *ib.*

transfer of valuable rights from *A* to *B* without a pecuniary return is not a sale[1]. But we have seen that, by means of a covenant to stand seised, made upon any 'lawful' consideration, an use could be created. To have allowed a covenant made in consideration of money or valuable consideration to escape the Statute of Inrolments, would have been to connive at the grossest evasion of the intention of Parliament. And, accordingly, covenants to stand seised in consideration of value have always been treated as Bargains and Sales within the statute[2]. But the same reasoning did not apply to covenants made upon other 'lawful' consideration, e.g. natural love and affection. And it has accordingly been held, from very early days, that a covenant to stand seised made upon consideration of blood, i.e. in favour of legitimate blood relations, is outside the Statute of Inrolments[3]. And such a conveyance, though unusual, is perfectly lawful at the present day, as is, also, a Bargain and Sale duly inrolled.

Interests less than freehold.

(ii) *Bargains and Sales of interests less than freehold.* Here, in truth, is the weakest point of the Statute of Inrolments. As we have seen, it only covers Bargains and Sales 'of inheritance or freehold.' And it was soon suggested, by astute conveyancers, that a Bargain and Sale might very well be used (without inrolment) to create, in favour of an intending purchaser, a term of years which, by means of a Release (a species of conveyance hereafter to be described), could be converted into a larger estate. This ingenious idea was not entirely new; for it had long been the practice, in certain cases, to make an ordinary demise for a year to an intending purchaser, and then, when he had entered on the land, to

Lease and release.

At common law.

[1] It should be noticed that the Rolls of Parliament differ from the accepted version of the statute by using the term 'contract' instead of 'sale.' The point is important in construing the 17th section of the Statute of Frauds (29 Car. II. (1677) c. 3). The doctrine of the Court of Chancery was adopted by the Common Pleas in *Taylor* v. *Vale* (1589) Cro. Eliz. 166.

[2] Coke, 2nd Inst. 672.

[3] *Sharington* v. *Strotton* (1566) Plowd. at p. 309.

release to him the reversion. The objection to this conveyance by 'Common Law Lease and Release' was that, while it dispensed with the ceremonious livery of seisin, it still necessitated actual entry by the purchaser. But the Bargain and Sale for a year was free from any such objection; for, by virtue of the Statute of Uses[1], it operated to create at once a legal estate in possession in the bargainee, which could, at any time during the year, be enlarged by Release into a freehold estate. As a matter of fact, the Bargain and Sale and the Release, when used for the purposes of a conveyance of the legal freehold, were parts of the same transaction, the Release, to satisfy legal theory, being dated one day subsequently to the Bargain and Sale. This ingenious evasion of the Statute of Inrolments received judicial sanction, clear and unmistakeable, in the case of *Lutwich* v. *Mitton*[2], which came before the Court of Wards in 1620; but it is probable that it had for some time been familiar to practitioners[3], for the judges in that case treated the validity of the device as beyond question[4]. And, since the date of *Lutwich* v. *Mitton*, it has never been doubted, that the Bargain and Sale with Release, or (as it is more generally termed) the Lease and Release, is a perfectly effectual method of conveying freeholds in possession. The form of the conveyance was slightly altered in practice by a statute of the year 1841[5], which dispensed with the necessity of effecting the Lease and Release by distinct documents; but the statutory Release authorized by that Act was in general use only for

Under the Statute of Uses.

Lutwich v. *Mitton.*

[1] 27 Hen. VIII. (1535) c. 10. [2] Cro. Jac. 604.

[3] The practice can hardly be older than 1562, in which year an Act of Parliament (5 Eliz. c. 26) extended the Statute of Inrolments to the Counties Palatine of Lancaster, Chester, and Durham. Had the evasion been known to the Legislature, they would probably have strengthened the wording of the old statute. But it may have come in at any time between 1562 and 1620.

[4] 'Wherefore they would not permit this point to be further argued.' The whole of the short judgement should be carefully studied; it is rarely that so much law is to be found in a dozen lines of reporting.

[5] 4 & 5 Vict. c. 21.

a few years [1], and the Act itself was repealed in 1874 [2]. The Lease and Release, on the other hand, though superseded in practice by the conveyance next to be described, remains a perfectly valid conveyance at the present day, in the cases to which it is applicable. This reservation brings us to notice the defects of the Lease and Release, regarded as a type of conveyance.

Defects of the Lease and Release.

A Bargain and Sale is, obviously, founded on the assumptions, that the vendor is seised of the premises to be conveyed, that he undertakes to hold them to the use of the purchaser, and that this use is executed by the Statute of Uses. Consequently, it could not, while its real meaning was understood, be employed to convey interests not founded on a legal seisin. Thus, persons incapable of standing seised to a use, e.g. the king [3], or a corporation [4], could not convey by Bargain and Sale; neither could terms of years, nor incorporeal hereditaments (other than those expressly mentioned by the Statute of Uses [5]) be so transferred, though they might be so created [6]. The normal means of supplying these deficiencies was the deed of Grant, which, being quite independent of possession in its operation, could not, at any rate whilst feudal principles held sway, be employed to transfer a present estate of freehold. And thus arose the distinction, that freehold estates in

[1] Being virtually superseded by 7 & 8 Vict. (1844) c. 76.

[2] 37 & 38 Vict. c. 96 (S. L. R. Act).

[3] *Atkins* v. *Longvile* (1602) Cro. Jac. 50. This is the theory upon which the 1 Ric. III. (1483) c. 5. was based.

[4] See Gilbert, *Uses* (3rd ed.), p. 7, and the learned note by Lord St. Leonards. And, especially, *Holland's and Boins'* Case (1587) 2 Leon. 121, 3 Leon. 175.

[5] Rents, reversions, and remainders. But the grant was the more usual conveyance. And seisin of a remainder is, of course, impossible in fact.

[6] The decision in *Beaudely* v. *Brook* (1607, Cro. Jac. 189) did not, as is commonly supposed, deny that an easement could be created by Bargain and Sale. It merely asserted that there could not be a Bargain and Sale of an easement not in existence. Had the defendant in that case bargained and sold his land to the intent that the plaintiff should have a right of way over it, the conveyance would have been good. In conveyances executed after Dec. 31, 1881, this is now a statutory rule. (Conveyancing Act, 1881, 44 & 45 Vict. c. 41. § 62.)

possession *lay in livery*, while all other interests in land *lay in grant*. This distinction was reasonable, so long as freeholds in possession were only transferable by livery of seisin, Fine, Recovery, or other notorious conveyance. But, when the Lease and Release under the Statute of Uses had rendered notorious conveyances for the most part unnecessary, the distinction became a purely technical one[1], and was simply the occasion of mistakes amongst unskilled practitioners. It was, accordingly, after one unsuccessful attempt[2], finally enacted by the Act to Amend the Law of Real Property[3], that from October 1, 1845, all corporeal hereditaments should, as regarded the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. From that time, the deed of Grant became the usual method of conveying interests in land, of whatever kind, and so remains, with certain important modifications, to the present day. Being perfectly general in its character, and deriving its operation from the words employed in it, it could be used to create or transfer interests of every kind. And, although a reminiscence of the older law inclined practitioners to insist upon the 'delivery' of the deed, in the place of the delivery (or 'livery') of seisin, it seems to have been the better opinion, that the interest passed by the execution of the deed, at least if the grantee's assent could be proved or assumed[4]. Of course, the grantee has not seisin until he has taken corporeal possession. But the operation of the Grant entitles him to do this at once if the grantor be in possession; or, now that the attornment of tenants is no longer necessary upon a conveyance of a reversion[5], to demand the rents and profits from lessees. Grant.

Inasmuch as the word 'grant' is expressly named in the Act to Amend the Law of Real Property, prudent conveyancers who relied upon the force of that statute religiously employed 'Grant' no technical importance.

[1] The Bargain and Sale, like the Grant, was an 'innocent' conveyance; i. e. it conveyed nothing but what the bargainor lawfully had.

[2] 7 & 8 Vict. (1844) c. 76. [3] 8 & 9 Vict. (1845) c. 106. § 2.

[4] *Doe* v. *Knight* (1826) 5 B. & C. at p. 692.

[5] 4 Anne (1705) c. 16. § 9.

that particular word. But a recent statute has rendered such literal accuracy unnecessary [1]. And the Act itself [2] provides that neither the word 'grant' nor the word 'give' shall imply any covenant in law in respect of any tenements or hereditaments, except so far as any such meaning may be given to it by any Act of Parliament. A conspicuous example of the exceptions alluded to is that created by the Lands Clauses Consolidation Act, 1845, which implies covenants for title upon the use of the word 'grant' by the promoters of an undertaking under the Act [3].

[1] 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), § 49.
[2] 8 & 9 Vict. (1845) c. 106. § 4.
[3] 8 & 9 Vict. c. 18. § 132.

CHAPTER XIX.

THE MODERN CONVEYANCE.

THERE had long been a feeling amongst law reformers, that the lengthy and technical types of conveyance, which had come down from the medieval conditions of land transfer, should be abandoned in favour of simpler forms. And several statutory attempts in this direction had been made[1] before the passing of Lord Cairns' famous Bill in 1881. But two serious difficulties had until that time hindered the adoption of the reform. In the first place, there was no real wish on the part of any considerable section of the public to deprive landowners of the power of determining their own conveyancing arrangements; for that would have been to introduce State socialism under the cover of a Conveyancing Act. And, in the second, so long as the barbarous and wholly unreasonable method prevailed, of remunerating solicitors according to the length of the documents prepared in their offices, it was hopeless to expect the acceptance by the legal profession of a reform which, while in no way diminishing their responsibilities or dispensing with the necessity for the exercise of care and skill, would have deprived solicitors of two-thirds of their remuneration in any given case[2].

Conveyancing reform.

Lord Cairns' Bill of 1881 happily evaded both these

Lord Cairns' Bill.

[1] The most conspicuous was the 8 & 9 Vict. (1845) c. 119, not actually repealed till 1881.

[2] There had been a slight approach in this direction by the 8 & 9 Vict. (1845) c. 119, § 4. But the provision had been virtually a dead letter.

difficulties. It did not attempt to prescribe any compulsory form of conveyance; it merely provided, that the adoption of certain expressions[1] in a conveyance should be held to imply an intention to make use of the *formulae* of the projected Act. Accordingly, it is perfectly open for a conveyancer at the present day to ignore entirely the conveyancing *formulae* of the statute, if he considers that the special requirements of a transaction cannot satisfactorily be expressed by them. The Act merely offers convenient abbreviations, which may be accepted or refused. Again, Lord Cairns' chief measure[2] was accompanied by another Bill, which substituted a more satisfactory, if not entirely perfect, principle of solicitors' remuneration, for the old method of payment by length. The scheme of Lord Cairns, though seriously jeopardized by political circumstances, received the assent of Parliament in 1881, and has been a great and unequivocal success.

Conveyancing Act, 1881.

For the purposes of the present chapter, we are concerned with the Conveyancing Act only in so far as it virtually regulates the form of a modern conveyance, by implying expressions and clauses, the terms of which were formerly set out in detail in each conveyance. The best way in which to realize the changes effected by the Conveyancing Act will be, to take the contents of a normal conveyance of freeholds clause by clause, and indicate briefly the provisions of the Act respecting each.

Form of a modern conveyance.

Date.

A. *Date.* Every conveyance commences with a statement of the day, month, and year on which it is made. The Act makes no alteration in this clause.

Parties.

B. *Parties.* Then follow the names, addresses, and descriptions of the parties to the conveyance. These are unaffected by the Act.

[1] As to these expressions, see post, pp. 316–9. The weak point in the scheme is, that an ignorant draftsman might use the technical expressions of the Act without realizing their significance.

[2] i. e. the Conveyancing Act. The scheme was originally a trilogy; but the third member, the Settled Land Act, did not make its appearance till the following year.

C. *Recitals.* It is then usual to state briefly the circumstances which have led up to the contemplated transaction, except where the latter is so simple that no such explanation is required[1]. Much difference of opinion prevails among conveyancers as to the extent to which recitals should be used, many practitioners holding that they are dangerous items, and should be reduced to a minimum. But two objects seem to authorize the judicious use of recitals, viz., Recitals

(i) *The saving of future expense.* Recitals contained in documents twenty years old must be accepted as evidence of truth of the facts which they state, by a purchaser investigating title under a contract of sale[2]. This rule may operate very favourably for a vendor who has only recent title-deeds, if he has taken care to insert judicious recitals in the conveyance under which he himself bought.

(ii) *The explanation of difficulties.* Although the doctrine, that a recital can positively control an inconsistent clause in the later part of the conveyance, seems now to have been abandoned[3], there can be little doubt that an ambiguity in a technical phrase would be interpreted in the light of a previous recital contained in the same conveyance[4]. Moreover, a recital may give a future owner of the property a useful hint for the protection of his interests; as, for example, where a conveyance, apparently voluntary, contains a recital which shows that it was in fact made in pursuance of a previous contract for valuable consideration.

D. *Consideration.* It is most important that the equivalent given by the purchaser should be accurately stated; not merely to avoid all difficulties about Stamp Duty, but because the omission or misstatement of a Consideration might give rise to serious questions affecting the validity of the conveyance. It is true, that no Consideration is necessary to pass Consideration.

[1] Each recital is introduced by the word 'whereas.'

[2] Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), § 2.

[3] *Page* v. *Midland Railway Co.*, 1894, 1 Ch. 11.

[4] *Williams* v. *Pinckney* (1898) 67 L. J. Ch. 34.

the legal estate in land; but, in the absence of Consideration, a trust for the conveying party will usually be presumed, and a misstatement of Consideration might give rise to a similar presumption. Moreover, misstatement of Consideration suggests fraud[1]. The Conveyancing Act makes no difference in the statement of the Consideration; but it contains a useful proviso[2] that any receipt for the Consideration money (whether contained in the body of the deed or endorsed upon it) shall, in favour of a subsequent purchaser who has received no notice of its untruth, be sufficient evidence of payment. Formerly it was usual to have two receipts, one in the body of the deed, and another endorsed and specially signed. This course is rendered unnecessary (but not unadvisable) by the express provisions of the Conveyancing Act, 1881[3].

Operative clause.

E. *Operative clause.* This is the very marrow of the conveyance, and contains the actual statement of transfer. Formerly it was necessary to use great care in selecting the precisely appropriate terms, e. g. 'enfeoff,' 'grant,' 'give,' 'release,' &c. But the Conveyancing Act, 1881, provides[4] that the use of the word 'grant' shall not now be necessary to convey tenements and hereditaments; and thus the last remnant of uncertainty left by the Act to Amend the Law of Real Property[5] has been removed. It is now usual to employ the colourless word 'convey.'

Parcels.

F. *Parcels.* After the 'operative clause' comes a careful statement of the subject-matter, an interest in which is intended to be transferred by the conveyance. So far as the actual physical boundaries are concerned, this is still necessary; and, provided that care and accuracy be shown, the fuller the details the better. But it was formerly usual to add a string of so-called 'general words' intended to cover (*a*) all physical things connected with the land conveyed, (*b*) all minor rights appurtenant to the principal rights intended to be transferred.

'General words.'

[1] *Bridgman* v. *Green* (1755), 2 Ves. Sr. 627.
[2] 44 & 45 Vict. (1881) c. 41. § 55.
[3] ib. § 54. [4] ib. § 49.
[5] 8 & 9 Vict. (1845) c. 106. § 2.

An elaborate section of the Conveyancing Act[1] has, however, provided for the extinction of 'general words,' by laying down a statutory rule, to the effect that the objects of the 'general words' clause shall be attained by implication in every conveyance of land. Broadly speaking, the conveyance will, unless qualified by express terms, pass (*a*) all physical substances annexed to the land or the buildings upon it, (*b*) all rights enjoyed with or reputed as part of the land or buildings. So wide, in fact, are the words of the section, that it is now incumbent rather on the vendor than on the purchaser to have an eye to the possible consequences of the conveyance. But, of course, no right not legally or reputedly appurtenant to the land conveyed would pass by the conveyance, without express mention.

A second clause formerly attached to the parcels of a conveyance was known as the 'estate clause.' It was intended to comprise 'all the estate and interest' of the conveying party; and was, therefore, obviously inapplicable, where the conveyance operated to create a smaller estate out of a larger. It is now to be implied, except in cases in which the context is inconsistent with such a construction[2]. 'Estate clause.'

G. *Habendum.* A clause commencing 'to have and to hold' is subjoined to the parcels, with the object of marking out precisely the extent of the interest to be taken by the purchaser. The need for the insertion of this clause is not abolished by the Conveyancing Act; but several important alterations have been made by the statute in the construction of its contents. These relate to the precise terms necessary to indicate the various classes of heritable estates; and have, accordingly, been dealt with in detail in the chapters treating *Habendum.*

[1] 44 & 45 Vict. (1881) c. 41. § 6. It must be carefully noted, however, that the Act gives no statutory title to the purchaser. He merely gets what he would have got if the words had been actually used by the vendor (§ 6 (5)). And it does not follow that a purchaser is always entitled to have them implied (*Peck and London School Board*, 1893, 2 Ch. 315).

[2] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 63.

of estates. Briefly, the Act empowers[1] the use of the phrases 'in fee simple' and 'in tail,' for the old essential technicalities of 'and his heirs,' 'and the heirs of his body' respectively. But it should be carefully noted, that the alternatives authorized by the Act are just as technical as the older phrases; and, except in Wills, are the only possible alternatives of the medieval forms.

Tenendum. The '*tenendum*' part of the clause under discussion is now practically meaningless, unless the conveyance create a smaller estate to be held of the conveying party, in which case a '*reddendum*,' or rent-paying clause would probably be added. But the creation of a new socage tenure is so unusual in modern practice, that the *reddendum* clause is now confined to conveyances of terms of years and copyholds. By a curious error in draftsmanship, the forms set out in the fourth schedule to the Conveyancing Act substitute for the '*habendum*,' which really has a meaning, the '*tenendum*,' which, as these forms are drawn, has none.

Discrepancy between parcels and *habendum*. A very natural question may arise in the mind of the student as to the effect of a discrepancy between the operative and the *habendum* clauses; and the state of the law on the subject is not entirely satisfactory. The leading case is that of *Kendal* v. *Micfeild*, decided in 1740[2]. The Master of the Rolls (Hon. John Verney), in his judgement, laid down three rules as 'fully established' and 'plain and clear.'

Enlargement by *habendum*. (i) That an *habendum* clause may carry the limitation farther than the operative words, and thus enlarge the interest given by the latter. For example, if a man convey to *H*, *habendum* 'to *H* and his heirs'; here *H* will get a fee.

No abridgement. (ii) That an *habendum* clause cannot abridge an estate previously given. Thus, if a man convey to *H* and his heirs, *habendum* to *H*; the subsequent clause will not abridge the fee conveyed by the former[3].

[1] § 51. [2] Barn. Chy. 46.

[3] The same rule holds if the effect of the *habendum* would be to limit a void estate (*Goodtitle* v. *Gibbs* (1826) 5 B. & C. 709). At one time there

(iii) That an *habendum* clause may vary and alter the estate conveyed by the operative clause, in any manner not inconsistent with its actual words. Thus, if an estate be granted to *A* and *B*, to have and to hold to *A* for life, remainder to *B*, the *habendum* will have effect, because it does not really derogate from, but only explains, the original grant [1]. Variation.

These rules appear to be recognized at the present day [2].

H. *Declaration of Uses.* Either in the *habendum* or in a subsequent clause, the uses to which the legal estate is intended to be conveyed should be stated. Of course the uses, if directly founded upon a legal seisin, will be immediately executed by the Statute of Uses; but the fact of their expression will prevent the raising of uses by implication of law. No doubt, if the circumstances are such as to convince the Court, that the beneficial enjoyment of the premises was intended to be secured to some person other than the acquirer of the legal estate, the Court will declare a trust, or equitable interest, in favour of that person. But, if the uses are declared by the conveyance, the Court will be unable to deny the existence of the legal estate, in the person in whose favour they are declared. Uses.

By far the greatest effect of the Conveyancing Act in shortening the forms of deeds is, however, to be found in the matter of—

I. *Covenants.* A covenant (*conventio*) is, as its name implies, a contract entered into between two or more parties, for the performance of certain acts or the observance of certain forbearances. In its origin, it has no necessary connection with a conveyance. But the feudal principle, that a feoffor of land always guaranteed the peaceful seisin of his feoffee (the doctrine of Covenants.

was an apparent exception to this rule, where an estate was limited by the operative clause which could not take effect without some external act, e.g. livery of seisin, followed by an *habendum* of an interest which could take effect without or with a less troublesome external act (*Baldwin's* Case (1589) 2 Rep. 23 a).

[1] *Anon.* (1562) F. Moo. 43, pl. 133.

[2] Elphinstone, *Interpretation of Deeds*, cap. xiv.

'warranty'), led, on the abandonment of strictly feudal principles, to the appearance in conveyances of covenants having a similar object. And these 'covenants for title' constituted, on the eve of the passing of the Conveyancing Act, one of the most important as well as the bulkiest items, in the contents of an ordinary conveyance. They varied in wording and scope, according to the nature of the transaction and the character of the conveying parties; but they tended naturally to group themselves into types on those lines. This tendency has been skilfully adopted by the Act, which provides[1], in effect, for four classes of transactions:—

Beneficial owner.

1. *A conveyance for valuable Consideration (other than a mortgage or a demise at a rent*[2]*) by a 'beneficial owner*[3]*.'* In this case, the party conveying 'as beneficial owner' is deemed to have entered into a covenant to the following effect:—

Right to convey.

(i) That he has a right to convey the premises, in manner and on the terms expressed in the conveyance;

Quiet enjoyment.

(ii) That the purchaser shall enjoy the premises, undisturbed by any claim made by or through the conveying party or any one for whom he is responsible;

Free from incumbrances.

(iii) That the conveying party will indemnify the purchaser against all incumbrances created by the same persons, and not expressly reserved by the conveyance;

For further assurance.

(iv) That the conveying party and all such other persons will, at the request and cost of the party demanding it, do any act necessary for further assuring the premises to the purchaser or his successors in title.

The responsibility of the covenantor, under these clauses, is limited to his own acts and defaults, and those of his predecessors in title, up to and including the last purchaser for value. If the conveying party be himself a purchaser for

[1] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 7.

[2] ib. § 7 (5).

[3] The Act does not appear to define a 'beneficial owner'; and, for purposes of the statute, the use of the term is conclusive. But, in practice, a man does not convey 'as beneficial owner' unless he receives, for his own benefit, the fair equivalent of the property conveyed.

value, his responsibility is, therefore, limited to his own acts and defaults. If he inherited from his father, or took by devise from a man who purchased for value, he would be responsible for the acts and defaults of his father or testator; and so on. But a person who takes under a marriage settlement is not, for this purpose, a purchaser for value[1].

2. *A conveyance by way of mortgage by a 'beneficial owner*[2].' Here the conveying party ('mortgagor') is held to have entered into covenants similar to those in the last case, except that his liability is not limited to the acts of his voluntary predecessors in title[3]. The very unsatisfactory wording of the 2nd section of the Act entitles us to say, that there is no definition of a mortgage in the statute; but it is well settled, that any transaction, whatever it may be called, which treats land or other subject-matter as a security for the repayment of money, is a mortgage[4]. Mortgage.

3. *A conveyance by way of settlement by a 'settlor.'* Here the only covenant implied against the conveying party is a covenant for further assurance, limited to his own acts and those of persons claiming through him. The Conveyancing Act contains no definition of a settlement; but it will probably be safe to read into it the definition given by the slightly later Settled Land Act[5], and to define a settlement as 'any instrument or instruments by virtue of which an interest in land stands limited to or in trust for any persons by way of succession[6].' From the point of view of legal theory, there would be not the slightest difficulty in conveying successive interests for pecuniary Consideration. As a matter of practice, the Settlement.

[1] It is a moot point whether a settlement in consideration of contemplated marriage is a 'conveyance for valuable Consideration' for the general purposes of the section. Probably this point would be settled in each case by the use of the words 'beneficial owner.'

[2] See note 3, p. 316.

[3] The 'quiet enjoyment' clause only applies after default in payment of the mortgage money.

[4] *Howard* v. *Harris* (1683) 1 Vern. 190.

[5] 45 & 46 Vict. (1882) c. 38, § 2 (1).

[6] This includes (ib. § 63) an instrument or instruments conveying land upon trust for sale and division of the proceeds amongst successive beneficiaries.

difficulties in the way of such a course would be great; and a settlement 'for valuable Consideration' usually means a settlement made in contemplation of marriage. A settlement made without pecuniary Consideration or Consideration of *future* marriage, is a 'voluntary' settlement; and it is probably to this class of settlements alone that the third type of covenant strictly belongs. But it is not usual now to take covenants for title (express or implied), even from a settlor in a settlement for valuable Consideration.

Fiduciary conveyances.

4. *A conveyance by a person acting in a fiduciary capacity*, i. e. '*as trustee*,' '*as mortgagee*,' '*as personal representative*,' '*as committee*' (*of a lunatic*), '*under an Order of the Court*.'

Here the only covenant implied against the conveying party is to the effect that he, personally, has not incumbered the title which he professes to convey [1].

When the subject-matter of a conveyance is a term of years held under a lease, certain other covenants are implied in the cases of a conveyance by a beneficial owner and a mortgagor; but these will be best dealt with in the next chapter. The following points in connection with the scheme of the Conveyancing Act should, however, be noticed.

Conveyance by 'direction.'

(i) Where one party 'as beneficial owner' directs another party to convey, the covenants of a beneficial owner are implied against the *former* [2], and not against the latter [3], unless he is also described as 'beneficial owner.' In such a case, covenants will be implied against both.

Husband and wife.

(ii) When husband and wife both convey 'as beneficial owner,' in addition to the ordinary covenants implied against each, the husband will also be deemed to covenant in terms of the covenants implied against the wife [4].

This provision, devised in the days when the powers of a married woman to bind herself by covenant were more

[1] The student should read very carefully the precise terms of the covenants as stated by the 7th section of the Conveyancing Act. The text gives them in a very abbreviated form.

[2] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 7 (2).

[3] ib. § 7 (4).

[4] ib. § 7 (3).

restricted than they now are, has been rendered largely inoperative by the Married Women's Property Acts of 1882 and 1893 [1]. There seems to be no reason now for a husband to join in the conveyance of his wife's separate property. But, as regards her property not affected by the Act of 1882, he must still join to make a title [2].

Having enumerated the usual covenants for title, we have now to answer two obvious questions:—

(i) *By whom and against whom may these covenants be enforced?* Operation of covenants.

With regard to the benefit of covenants for title, it has long been settled that it 'runs with the land,' i. e. that it enures for the advantage, not only of the actual covenantee, but also of all subsequent acquirers of the interest comprised in the conveyance, during the time that such interest is vested in them. This rule has been made statutory by the Conveyancing Act, 1881 [3], which has also abolished the necessity for employing the words 'heirs, executors, and assigns,' to enable the covenantee's representatives to take advantage of a covenant [4]. The liability of the covenantor is, of course, purely personal; but it can be enforced against his personal representatives, and, being by specialty, also directly against his heirs and devisees, at any time within twenty years after the accrual of the cause of action. And there is now no necessity to name the heirs of the covenantor [5]. The right to enforce the covenants will be exerciseable by each owner of an undivided portion of the premises comprised in the conveyance [6]; but, probably, not by the owner of a minor interest carved out of the interest so conveyed [7].

(ii) *What is the extent of the protection created by the covenants?* Extent of protection.

[1] 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63. [2] Ante, p. 284.
[3] § 7 (6).
[4] § 58. But it must not be assumed that the covenantee's assigns can enforce the covenant in all cases (See post, pp. 324–7).
[5] § 59 (1). [6] § 7 (6).
[7] Hood & Challis, *Conveyancing and Settled Land Acts* (3rd ed.), p. 35. But see the case of *Noble* v. *Cass* (1828) 2 Sim. 343.

It is obvious that we must deal with the covenants one by one[1]:—

(α) *For right to convey.* If, by reason of any defect in title for which the covenantor is responsible, he is legally unable to convey in the terms of the instrument at the time when it is executed, the covenant is broken at the moment of its making, and the covenantee can sue at once. In strictness, if the covenantor's title is wholly bad, the covenantee ought to get back his purchase money with interest, on the general principle that this is the measure of damages for non-fulfilment of a contract to convey land[2]. But, if the title of the covenantor be only partially bad, then the measure of damages will be the difference between the value, at the date of the conveyance, of the premises expressed to be conveyed, and the value of the premises actually conveyed[3].

(β) *For quiet enjoyment.* Here the right of the covenantee to sue does not arise, until he has been actually disturbed in his enjoyment of the premises. And, even then, he will only be entitled to damages to the extent of the loss actually suffered at the date of bringing the action. Thus, if a purchaser be merely subjected to a claim of right of way by a person for whom the vendor is responsible, he can only recover such damages as represent the inconvenience *already* incurred[4]. But if he be evicted or, apparently, threatened with total eviction, he can claim the full value of the premises at the time when the action is brought[5].

[1] The Act, no doubt, treats all the undertakings as branches of a single covenant. (See Lindley, L. J., in *David* v. *Sabin*, 1893, 1 Ch. at p. 531.) But acts which would be breaches of one clause are not always breaches of the others.

[2] *Flureau* v. *Thornhill* (1776) 2 W. Bl. 1078. The damages are not limited to the amount of purchase money and interest, if the vendor were aware of his defect of title; and, probably, the purchaser would be allowed to recover for his improvements in any case.

[3] *Gray* v. *Briscoe* (1606) Noy, 142; and *Wace* v. *Bickerton* (1850) 3 De G. & S. 751.

[4] *Child* v. *Stenning* (1879) 11 Ch. D. 82.

[5] *Lock* v. *Furze* (1866) L. R. 1 C. P. 441. Where the covenantor was himself seeking to disturb the covenantee, the latter would, probably, be entitled to an injunction against him.

(γ) *For freedom from incumbrances.* Here the covenantee is entitled to recover against the covenantor the expenses to which he may have been put, in clearing off incumbrances for which the latter is responsible, including those of the reasonable compromise of an action which he felt himself unable to defend.

In respect of these three covenants, the difference between the persons for whom the 'beneficial owner' is responsible, and those for whom he is not, is well illustrated by a comparison of the two recent cases of *David* v. *Sabin*[1] and *Kelly* v. *Rogers*[2]. In *David* v. *Sabin*[1], the defendant was held responsible for an incumbrance created by a former purchaser from himself, although, since the date of the incumbrance (which was unknown to him), he had repurchased for value from the incumbrancer, and conveyed away again to the plaintiff's predecessor in title, and even though the plaintiff himself claimed through the fraudulent incumbrancer. In *Kelly* v. *Rogers*[2], a covenant for quiet enjoyment by a mesne landlord was held not to be broken by an act of his superior landlord. And this case is supported by the very recent decision in *Baynes* v. *Lloyd*[3], on an implied covenant. *David* v. *Sabin*. *Kelly* v. *Rogers*.

(δ) *For further assurance.* Under this covenant, the covenantee can call upon the covenantor to do anything which lies in his power to complete the title of the covenantee, e.g. to enlarge a base fee into a fee simple, when it is clear from the deed that the purchaser was intended to obtain a fee simple[4], to vacate a judgement or other incumbrance, or to execute a duplicate of a lost instrument of title[5]. The covenant is of little practical value, so far as the acts of the covenantor himself are concerned; inasmuch as he would be estopped by his own deed from derogating from the covenantee's title. But it may be useful against strangers.

[1] 1893, 1 Ch. 523. [2] 1892, 1 Q. B. 910. [3] 1895, 1 Q. B. 820.
[4] *Bankes* v. *Small* (1887) 34 Ch. D. 415.
[5] *Bennett* v. *Ingoldsby* (1676) Cases in Chancery temp. H. Finch, 262. There was, however, no decision on the point.

Covenant for production of title-deeds.

The covenants for title are the only covenants which are 'usual' in a conveyance, in the sense that they will be implied from the mere adoption of a technical term. But there is another covenant which, though not an invariable content of a conveyance, was so frequently found, that the Conveyancing Act has made provision for its abbreviation. This is the covenant for production of documents. Whenever, for any reason, the whole of the documents constituting the title to the property are not handed over to the purchaser on the completion of a conveyance[1], the purchaser's advisers very rightly endeavour to protect him against the dangers which might arise from their absence, by securing the right to their production. This security formerly took the shape of a covenant by the conveying party to produce such documents as remained in his possession, to keep them safely, and, occasionally, to procure the production of others[2]. The Conveyancing Act of 1881 does not attempt to provide for the last case; but it deals with the two former, by substituting for the old lengthy covenant, with its provisoes and precautions, a simple acknowledgement and an undertaking, which may be used separately or together, according to the arrangements of the parties. The interpretation put upon the acknowledgement and undertaking may be thus briefly described[3].

Acknowledgement.

Where a person who retains possession of documents gives to another a written *acknowledgement* of that other's right to production, then the person giving the acknowledgement, and all other persons into whose hands the documents in question pass, are (so long only as they remain in their possession) bound to produce them for inspection, either privately or in court, for the behoof of the person entitled

[1] e.g. where the property in question at one time formed part of a greater property held under a single set of title-deeds, where the sale is of an equity of redemption, or where the vendor sells part of a property held under a single title.

[2] e.g. on the sale of an equity of redemption. As to 'equities of redemption,' see post, cap. xxiv.

[3] For the terms of the Act see 44 & 45 Vict. c. 41. § 9.

to the benefit of the acknowledgement, and also to supply, on demand by such person, copies of, or extracts from such documents, always at the expense of the person demanding the same. The liability created by the acknowledgement only binds the person in whose hands the documents actually are[1]; but it may be enforced by any person (not being a lessee at a rent) who claims, through the original recipient of the acknowledgement, to be interested in the property covered by the documents[2], or to be affected by the terms of such documents. The liability may be enforced by the Court in a summary way, on the application of any party entitled.

Undertaking.

A mere acknowledgement of liability to production imposes on the person giving it no responsibility for the loss of any documents[3]. But if any person retaining possession of documents give a written *undertaking* for safe custody thereof, he, and all subsequent possessors of the documents, will be responsible for such safe custody so long as they retain possession. The responsibility does not cover damage arising from inevitable accident[4]. In the event of any loss, the Court will, on the application of the party injured, assess the damages, and order payment in a summary way.

Like most of the other conveyancing provisions of the Act, the acknowledgement and undertaking clauses may be modified by the express terms of the documents into which they are incorporated[5]. But, in the absence of such modification, the benefit of the acknowledgement may be said (as we have seen) to run with the land, and the burden to run with the documents, the latter, apparently, quite independently of notice.

Other covenants.

Any other covenants necessitated by the special arrange-

[1] *Qu.*: whether any one could get rid of his liability by handing over the documents to a stranger who had no claim to them.

[2] The Act (§ 9 (3)) says 'any estate, interest, or right.' But if I purchase Blackacre from *A*, I cannot (surely) claim to see the title documents of Whiteacre, merely because *A* has a right to their production.

[3] See § 9 (6). [4] § 9 (9). [5] § 9 (12) (13).

ments of the parties to a conveyance must be set out in detail; and, in most respects, the construction put upon them will be that which results from an application of the ordinary principles of contract. The only point to which special allusion can here be made is, the question how far the benefit and the liability created by such covenants can be enforced by and against the successors of the original parties. Upon this point there have been some recent changes.

Extent of their operation.

Common law rule.

The strict and fundamental principle of the English Law of Contract is, that contracts can only be enforced by and against the original parties to them, and their personal representatives. To this rule there is, as we have just seen, a substantial exception in the case of covenants for title, and acknowledgements of the right to inspect documents. In the case of leaseholds, the principle has, owing to the provisions of two important statutes, to be explained in the succeeding chapter, been seriously impugned. But there has been no sweeping enactment affecting the conveyance of socage[1] interests; and such alterations in principle as have been introduced, are due to the decisions of the courts. We may state them briefly in the form of rules :—

Leaseholds.

Freeholds.

Benefit passes if intended to pass.

(i) *The benefit of a covenant may be enforced by the successors in title of the covenantee (as well as his representatives), if there is, in the circumstances of the conveyance, any evidence that such was the intention of the parties.* This rule is most frequently applicable in cases which result from the break-up of a residential estate into building lots. In the case of *Knight* v. *Simmonds*[2], the sub-purchaser, thrice removed, of a plot of land from the owner of a large property was held entitled to an injunction against another sub-purchaser, whose predecessor

[1] The case of the life estate is doubtful. It is expressly included in the statute of 1540 (32 Hen. VIII. c. 34); it is not referred to in the corresponding section (10) of the Conveyancing Act, 1881, which contains no definition of a 'lease' or 'leasehold.' But it is clear that these statutes do not contemplate a covenant contained in the conveyance by which a life estate is merely *transferred*.

[2] 1896, 2 Ch. 294.

in title had entered into restrictive covenants with the original owner of the property, 'his heirs, appointees, and assigns[1].' There was, obviously, no 'privity' between the plaintiff and the defendant; but the defendant had bought with knowledge of the covenant of which the plaintiff claimed the benefit, and it was considered that the plaintiff was fairly within the terms of the covenant. On the other hand, in *Everett* v. *Remington*[2], Romer, J., (though he did not deem it necessary to decide the point) considered it very doubtful, whether one purchaser from the owner of a large property could claim to restrain another from breach of a covenant made with the vendor, 'his heirs and assigns,' not to erect buildings without the consent of the vendor (naming him), 'his heirs or assigns.' The real difficulty in these cases is to ascertain to what land the benefit of the covenant is supposed to attach, whether to that retained or that disposed of by the covenantee. But it is clear that there must be some substantial connection between the land in respect of which the plaintiff claims, and that against the owner of which he seeks to enforce the covenant.

Burden passes with notice.

(ii) *The liability on a covenant may be enforced against the successors in title of the covenantor, if they acquired with notice of its existence.* This is the rule established by the celebrated case of *Tulk* v. *Moxhay*, decided by Lord Cottenham in 1848[3]. In that case, the plaintiff had sold the vacant ground in the centre of Leicester Square, London, to the defendant's predecessor in title; and the latter had covenanted to keep the ground as an open garden. The defendant had bought with

[1] In spite of section 58 of the Conveyancing Act, 1881, a draftsman may still be advised to insert the word 'assigns' in such covenants. They are strong evidence that the benefit of the covenant was intended to pass.

[2] 1892, 3 Ch. 148. See also *Renals* v. *Cowlishaw* (1878) 9 Ch. D. 125.

[3] 2 Phillips, 774. The covenant in this case mentioned the 'assigns' of the covenantor; but nothing turned on the expression, and, in the later case of *Wilson* v. *Hart* ((1866) L. R. 1 Ch. App. 463), it did not appear. The absence of the word may, however, in conjunction with other circumstances, show that the liability on the covenant was intended to bind only the covenantor and his representatives (*Fawcett's & Holmes' Contract* (1889) 42 Ch. D. 150).

notice of the covenant; though without binding himself to observe it. He threatened to build on the land; and at the suit of the plaintiff, who still retained property in the immediate neigbourhood, he was restrained from doing so. The notice with which a defendant acquires, need not be express[1]; and, in the case of a volunteer, it may be doubted whether even the absence of notice would excuse him from liability.

Equitable rights.

(iii) *Where the covenant does not run with the land at law, the rights and liabilities of successors are equitable only.* This was clearly the case before the passing of the Judicature Acts; and, although the provisions of those statutes countenance the view that equitable and legal rights now stand on the same footing[2], it seems clear that rights which originated in decisions of courts of Equity, are still subject to the conditions and restrictions formerly affecting them. The important result is, that in a claim upon a covenant not running with the land, the Court will take into account considerations affecting the reasonableness of the claim, and will not allow it to be enforced, if it considers that the claimant is morally debarred from invoking the assistance of the Court. Thus, where a plaintiff who claimed an injunction to prohibit the breach of a covenant not to use certain premises as a shop, had himself dealt at the shop, relief was refused[3]. Had the plaintiff sought to enforce a covenant made directly with himself, such a defence would not have been successful, though it might have reduced the damages.

Restrictive covenants.

(iv) *Only 'restrictive' or 'negative' covenants can be enforced under these rules.* This limitation of the equitable doctrine

[1] *Wilson* v. *Hart* (1866) L. R. 1 Ch. App. 463. The 'constructive notice' section of the Conveyancing Act, 1882 (§ 3), does not apply to such cases.

[2] e. g. 36 & 37 Vict. (1873) c. 66. §§ 24, 25 (11).

[3] *Sayers* v. *Collyer* (1884) 28 Ch. D. 103. A more doubtful theory, that alteration of circumstances alone will deprive the claimant of his equitable remedy, rests mainly on the decision of Lord Eldon in *Duke of Bedford* v. *British Museum* (1822) 2 My. & K. 552.

is, no doubt, due to the fact that, when courts of Equity began to build up that doctrine, the remedy by injunction was the only remedy open to a claimant seeking relief under it. So called 'mandatory' injunctions had not been invented; and an injunction was, in fact as well as in form, a prohibition. By a statute of the year 1858, known as Lord Cairns' Act[1], the Court of Chancery was empowered to award damages in substitution for, or in addition to the remedy by injunction, and this power remains, notwithstanding the repeal of Lord Cairns' Act[2]. But the original rule, which confined the equitable remedy to restrictive covenants, has recently been confirmed[3]; and if the covenant be, in effect, positive, it is no answer to the objection, to say that the defendant acquired with notice. If, however, the covenant, though in form positive, is, in fact, negative, it will be enforced. Thus, in *Catt* v. *Tourle*[4], the plaintiff conveyed land to a Building Society, which covenanted that he (the plaintiff) should have the exclusive right of supplying beer to all public houses which might be built on the land. The defendant bought from the Society, with notice; and built a public house which he proceeded to supply with his own beer. On appeal from V. C. Stuart, it was held, that the covenant was in effect a covenant restraining purchasers from getting their beer elsewhere than at the plaintiff's brewery; and a demurrer founded on objections to the form of the covenant was overruled.

Returning, in conclusion, to the changes in the form of a conveyance effected by the Conveyancing Act, 1881, we may notice, that the Act provides extensively for implied *Powers*, as well as for implied covenants. But these powers will be found, on examination, to be applicable only to special classes of conveyances, by which limited or, at least, termin-

Pow

[1] 21 & 22 Vict. c. 27. § 1.

[2] By the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49). See *Sayers* v. *Collier* (1884) 28 Ch. D. 103.

[3] *Austerberry* v. *The Corporation of Oldham* (1885) 29 Ch. D. 750.

[4] (1869) L. R. 4 Ch. App. 654.

able interests, are created. They will, accordingly, be more properly dealt with in the chapters on Mortgages and Settlements[1]. The reader who may wish to see at a glance the form given to an ordinary conveyance by the Conveyancing Act, may refer to Appendix I, in which will be found a copy of the form provided by the Fourth Schedule to the Act. But he must again be reminded that, by the terms of the Act, such a form is merely sufficient, not compulsory[2]; and, in fact, the extreme brevity therein affected is rarely attainable in practice.

[1] Post, capp. xxiv. xxv.

[2] Conveyancing Act, 1881, § 57.

CHAPTER XX.

DEMISE, ASSIGNMENT, AND SURRENDER.

Terms of years.

We have now to deal with the creation and transfer of terms of years. And, although, in the early days of conveyancing, the use of operative words seems to have been somewhat indiscriminate, it appears to have been agreed in Coke's time that the orthodox word for creating a term of years was 'demise,' or, perhaps, the full phrase, 'demise, grant, and to farm let[1].' Certainly it was becoming necessary in Coke's day to distinguish between the genuine demise for years, which created a tenure, and the purely statutory term invented by conveyancers to evade the Statute of Inrolments[2], and which, taking effect under the Statute of Uses[3], did not imply a tenure. It is, perhaps, to this distinction that we owe the technical consecration of the word 'demise,' which, as implying covenants for title[4], was unsuitable to the creation of a term under the Statute of Uses[3]. The latter class of interests for years will be dealt with in a subsequent chapter[5].

Creation of a term of years.

A term of years, created by demise, at first required, as we have previously seen, no special evidence or ceremonial for its creation. Until the lessee had entered, it was a mere contract, actionable if under seal, and, finally, as parol contracts were gradually recognized by the courts, also if by word of mouth or mere writing. The first important change in the

[1] Co. Litt. 45 b.
[2] 27 Hen. VIII. (1536) c. 16.
[3] 27 Hen. VIII. (1535) c. 10.
[4] *Baynes* v. *Lloyd*, 1895, 1 Q. B. 820.
[5] Post, cap. xxv.

Statute of Frauds.

law on this point was made by the Statute of Frauds [1], which provided, that all leases or terms of years not put in writing and signed by the parties making or creating the same, or their agents [2], should have the effect of leases at will only.

Real Property Act.

And this enactment was followed up, in the year 1845, by the Act to Amend the Law of Real Property; which provided that a lease, required by law to be in writing, of any tenements or hereditaments, should be void at Law, unless made by *deed* [3].

Two questions arise out of these statutory provisions. What leases are required by law to be in writing? What is the effect of non-compliance with the statutory provisions?

Leases to which the Acts apply.

(i) The Statute of Frauds made its requirements applicable to 'all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments [4].' From this application were exempted only, 'all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised [5].' In spite of the loose wording of the 1st section of the statute, it has always been held, that uncertain interests which do not contemplate a longer than three years' continuance, are within the exception. But leases of incorporeal hereditaments, even for less than three years, are not within the exception [6], they requiring a deed at common law, independently of the Statute of Frauds or of the Act to Amend the Law of Real Property. A lease for three years or under, which gives an option to the lessee to renew for a period which will exceed three years from the making of the lease, need not be in writing [7].

Option of renewal.

[1] 29 Car. II. (1677) c. 3. § 1. The grammar is that of the statute. It is difficult to see how a term of years can be put in writing.

[2] The agents must be authorized by writing.

[3] 8 & 9 Vict. c. 106. § 3. [4] 29 Car. II. (1677) c. 3. § 1. [5] ib. § 2.

[6] *Wood* v. *Leadbitter* (1845) 13 M. & W. at p. 843.

[7] *Hand* v. *Hall* (1877) 2 Ex. D. 355.

(ii) It will be noticed, that some little difficulty arises, with regard to the effect of non-compliance with the statutory provisions, owing to the fact that the two statutes are differently worded. The Statute of Frauds[1] declares, that transactions not complying with the requirements of its 1st section, shall 'have the force and effect of leases or estates at will only, and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect.' But the corresponding section of the Act to Amend the Law of Real Property[2] provides that the leases required by law to be in writing shall be void *at Law* unless made by deed. The natural inference to be drawn from these clauses would seem to be, that a failure to comply with their requirements would render the transaction nugatory at Law, though possibly operative in Equity to the full extent of its provisions if writing were employed, or to the extent of an estate at will if the transaction were by word of mouth. As a matter of fact, neither of these results has followed. A lease required by the Act of 1845 to be by deed, and not so created, will, if in writing, be treated as a contract to grant a valid lease on the same terms. The document is held to be void *as a lease*, but not as a contract[3]. If the lease be simply by word of mouth, it cannot be enforced as a contract, because of the 4th section of the Statute of Frauds[4]. But, if possession be taken under it, the lessee will be treated, not as a tenant at will, but as a tenant from year to year, limited by the terms of the lease[5]. This rather bold construction is, apparently, founded on the provisions of the repealed Conveyancing Statute of the year 1844[6]. It may be questioned whether the judicial resurrection of a rule which has been solemnly

Effect of informality.

Writing.

Word of mouth.

[1] 29 Car. II. (1677) c. 3. § 1.
[2] 8 & 9 Vict. (1845) c. 106. § 3.
[3] *Bond* v. *Rosling* (1861) 1 B. & S. 371; approved in *Tidey* v. *Mollett* (1864) 16 C. B. (N. S.) 298. Query: if the writing contained no word of an executory character?
[4] 29 Car. II. (1677) c. 3. § 4.
[5] *Tress* v. *Savage* (1854) 4 E. & B. 36.
[6] 7 & 8 Vict. c. 76. § 4.

buried by the Legislature, is quite in accordance with the theory of English law[1].

Wording of leases.

With regard to the wording of leases, much more has been left to the discretion of the parties than in the case of a transfer of an existing interest. Although a lease follows, generally speaking, the form of a transfer, as sketched in the immediately preceding chapter—date, parties, recitals, operative clause, parcels, *habendum*, *reddendum*, and covenants[2]—although a lease is a 'conveyance' for the purposes of the Conveyancing Act, 1881[3], yet no statutory form of lease is provided by the Act, and the provisions of the 7th section, which imply covenants for title, do not apply to a demise by way of lease at a rent[4]. On the other hand, the provisions of the 'general words,' and the 'all estate' sections, do apply to leases for years[5].

Covenants for title.

With regard to covenants for title, it has already been stated[6], that the mere relationship of lessor and lessee implies, on the part of the former, a covenant for quiet enjoyment during the continuance of his own interest and that of the lessee, and that the use of the word 'demise' implies also a covenant that he (the lessor) has power to grant the lease.

'Usual' covenants.

It also seems to be settled, that an intending lessor, who has entered into an 'open' contract[7] to grant a lease, can insist on having the following covenants inserted:—

(i) For payment of rent by the lessee[8];

[1] The real difficulty in construing the two statutes together arises from the fact that the Statute of Frauds does not, as suggested by the Act of 1845, 'require' leases for more than three years to be in writing. It merely declares that, if they are not, they shall be leases at will only. Placed between the conflicting claims of 'voidness' and 'estates at will,' the courts have evaded the difficulty by declaring in favour of a tenancy from year to year.

[2] There is no declaration of uses in a lease for years. No use limited upon a term of years is executed by the Statute. Of course no words of inheritance are necessary, however long the term created.

[3] 44 & 45 Vict. c. 41. § 2 (v). [4] ib. § 7 (5). [5] ib. §§ 6, 63.

[6] Ante, pp. 82-3.

[7] i.e. a contract which contains no express reference to covenants, or which provides for 'usual' covenants.

[8] *Taylor* v. *Horde* (1757) 1 Burr. at p. 125.

(ii) For repair by the lessee, not even excepting the casualty of fire[1];

(iii) For payment of tenant's (rates and) taxes by the lessee[2];

(iv) A proviso for re-entry by the lessor on non-payment of rent[3].

Any other covenants which either party claims to insert, must be made the subject of special arrangement in the contract for the lease. It will be observed that, of the four 'usual' covenants, all but the last merely embody liabilities already implied by law.

Assignment.

We have now to deal with the process by which a term of years is transferred, or, as it is usually called, 'assigned.' The right of a lessee to transfer his interest, unless specially restrained by the terms of his lease from so doing, is clearly recognized by English law[4]. The Statute of Frauds provides[5] that no leases of lands, whether of freehold interests or terms of years, shall be assigned, except by deed or note in writing, signed by the assignor or his agent authorized by writing. And the Act to Amend the Law of Real Property[6] strikes away the alternative, and requires that all assignments of a chattel interest in any tenements or hereditaments shall be by deed, upon pain of being deemed void at Law[7]. All assignments of terms of years must, therefore, be made by deed.

Covenants for title.

An assignment of a leasehold is a 'conveyance' within the meaning of the Conveyancing Act, 1881; and an assignment for valuable Consideration, by a person professing to convey or assign[8] 'as beneficial owner,' will imply the covenants for

[1] *Sharp* v. *Milligan* (1857) 23 Beav. 419.

[2] *Hampshire* v. *Wickens* (1878) 7 Ch. D. 555, by implication.

[3] *Hodgkinson* v. *Crowe* (1875) L. R. 10 Ch. App. 622. The Court emphatically declined to allow the proviso to extend beyond the non-payment of rent.

[4] *Hampshire* v. *Wickens* (1878) 7 Ch. D. 555.

[5] 29 Car. II. (1677) c. 3. § 3. [6] 8 & 9 Vict. (1845) c. 106. § 3.

[7] It will be observed that the Act makes no exception in favour of the assignment of terms of years which may be *created* without deed or writing.

[8] It is immaterial which word is used. Conveyancing Act, 1881, § 2 (v).

title implied in a similar conveyance of freeholds[1]. It will also imply a covenant on the part of the assignor, to the effect that, so far as his own acts and those of his volunteer predecessors are concerned, the lease creating the term assigned is valid and unavoidable, and that the lessee's covenants and conditions have been performed up to the time of the conveyance[2]. The Act provides for no covenant by implication on the part of the assignee; but it is the practice of conveyancers (and the practice would, probably, be enforced by the courts), to make the assignee covenant for the due future performance of the lessee's covenants and conditions in the lease, and for the indemnity of the assignor therefrom[3]. And, even in the absence of such covenant, the assignee is liable to the original lessee for any loss which he may have incurred by reason of the failure of the assignee, during the continuance of his holding, to perform the covenants and conditions of the lease[4].

Benefit and liability under lease.

By far the most difficult question, however, which arises out of the assignment of a lease, is the question how far successive acquirers of the term are, as between themselves and the reversioners, entitled to the benefit or subject to the liabilities of the covenants and conditions contained in the lease itself. And, in close connection with that question arises another. How far are successive acquirers of the reversion similarly so entitled or bound? We have seen that, as regards covenants in conveyances of freeholds, these questions have been discussed only in recent years by courts of Equity. As regards terms of years, the matter has engaged the attention of the Legislature for upwards of three centuries.

Covenants which 'touch or concern.'

But, before dealing with these questions in detail, we must make one very important reservation. Despite the very wide language of the statutes, there can be no serious argument

[1] Conveyancing Act, 1881, § 7 (A). [2] ib. § 7 (B).

[3] If the assignor will himself be under no future liability, e. g. if he is neither the original lessee nor an assignee who has given a covenant of indemnity, he cannot demand the covenant.

[4] *Moule* v. *Garrett* (1872) L. R. 7 Exch. 101.

that the benefit or the burden of covenants will pass with the reversion or the term, unless those covenants relate to something to be done or forborne upon the land which is the subject of the term. The expression of the older decisions is, 'which touch or concern the thing demised[1].' The most recent statute on the subject says, 'having reference to the subject-matter thereof[2].' Under these definitions, it is quite clear that a covenant to do or not to do something entirely unconnected with the land, e. g. that the lessee will teach Greek to all or any of the children of the lessor at a fixed rate, would not 'run,' either with the term or with the reversion. That is to say, no person, merely as being owner of the reversion, could enforce such a covenant against any other person, merely on the ground that the term of years granted by the lease was vested in him. Such a covenant would be purely personal; the liability under it could not be assigned without the consent of the covenantee; and the benefit of it could only pass (if at all[3]) by assignment as a *chose in action*, under the Judicature Act[4].

'Thing in esse.'

But another interpretation of the restriction has given rise to some difficulty. The report in *Spencer's* Case[5] draws a distinction between a covenant 'which extends to a thing *in esse*, parcel of the demise,' and a covenant 'which extends to a thing which is not in being at the time of the demise made,' albeit the covenant may be for acts to be done upon the land. Thus, a covenant to repair existing buildings falls under the former definition; a covenant to build does not. This was the precise point at issue in *Spencer's* Case[6]; and the decision was, that the latter kind of covenant only binds the assigns of the covenantor, if 'assigns' are expressly named in the

[1] *Spencer's* Case (1583) 5 Rep. 18. [2] Conveyancing Act, 1881, § 10 (1).

[3] It is very doubtful if the Judicature Act has made *choses in action* assignable which were not previously assignable *in Equity*. And a covenant such as we have suggested would probably not have been assignable in Equity.

[4] 36 & 37 Vict. (1873) c. 66. § 25 (6). [5] (1583) 5 Rep. 16.

[6] See fo. 16 b.

covenant. This highly technical distinction was seriously jeopardized by the decision in *Minshull* v. *Oakes*[1]; where the Chief Baron (Pollock) and the Court of Exchequer held, that a covenant by a lessee, 'for himself, his executors, administrators, and assigns,' that he, 'his executors and administrators,' would repair buildings to be erected after the date of the lease, was binding on the assignees of the covenantor. The Chief Baron rested his decision largely on the fact, that the covenant was not a covenant to erect buildings, and that it could only apply to buildings which had, *de facto*, before the liability could arise, become part of the subject-matter of the lease. So far as the technicalities of the case were concerned, it would have been better to rely on the opening words of the covenant, which at least made the assigns responsible if the personal representatives failed to perform the covenant. But the decision in *Spencer's* Case must be considered to be still in force, in spite of recent legislation[2].

We now come to the main point. Suppose a covenant or condition to be deemed to be 'annexed to' the estate granted by the lease, what is the actual result? The answer may be stated in the form of four rules.

Benefit runs with reversion.

(i) *Subsequent acquirers of the reversion will be entitled to enforce it.* It appears from the cases quoted by Coke, in his report of *Spencer's* Case[3], that this was the rule at common law, *so far as covenants were concerned.* In respect of conditions, the old rule applied, that no one could take advantage of a condition save the person in whose favour it was reserved, or his heir[4]. But a statute passed in the year 1540, consequent upon the suppression of the monasteries, gave to the

[1] (1858) 2 H. & N. 793. The Court quoted in support of its decision the earlier cases of *Smith* v. *Arnold* (3 Salk. 4) and *Bally* v. *Wells* (1769, 3 Wils. 25). But *Smith* v. *Arnold* is undated, and the report is very unsatisfactory; while in *Bally* v. *Wells* the word 'assigns' was expressly used.

[2] It should be carefully noted that neither § 10, nor § 11, nor § 58 of the Conveyancing Act, 1881, touches this point.

[3] (1583) 5 Rep. 17 b.

[4] Co. Litt. 214 a.

grantees or assignees of reversions the same remedies by entry for non-payment of rent or other forfeiture, and by action for non-performance of other conditions, covenants, or agreements, contained in the indentures of leases granted by their predecessors in title[1]. It will be observed, that this statute applies in terms only to conditions and covenants contained in *indentures*[2]; but there was a disposition on the part of the courts in later times to extend its provisions to parol leases[3]. It is conceived that the wording of the Conveyancing Act, 1881[4], removes all doubts on this subject. The Conveyancing Act[5] also does away with the distinction between actual grantees or assignees of the reversion, and persons who are merely entitled to the benefits of the lease, by providing that such conditions and covenants can be enforced by any person for the time being entitled to the income of the land. Finally, the Conveyancing Act provides for the exercise of the lessor's rights by the respective sharers in a divided reversion[6], and for the apportionment of such rights upon the severance of the reversion, or the cesser of the term as to part only of the land[7]. Inasmuch as all the stipulations in leases are, in too many cases, and despite *Hodgkinson* v. *Crowe*[8], included under the condition for re-entry, the removal of the old doctrine of the indivisibility and inalienability of a condition, is extremely important. The results of this first rule are expressed in technical language by saying, that 'the benefit of covenants and conditions runs with the reversion.'

(ii) *Subsequent acquirers of the reversion will be bound by it.* It seems to be the orthodox view, that this was not a rule of

Liability runs with reversion.

[1] 32 Hen. VIII. c. 34. § 1. [2] *Standen* v. *Chrismas* (1847) 10 Q. B. 135.
[3] *Cornish* v. *Stubbs* (1870) L. R. 5 C. P. 334.
[4] § 10 (1). The word used is 'lease,' which does not imply a deed.
[5] ib.
[6] ib. This had previously been decided in *Twynam* v. *Pickard* (1818) 2 B. & Ald. 105; and *Badely* v. *Vigurs* (1854) 4 E. & B. 71.
[7] Conveyancing Act, 1881, § 12. This is an extension of the provisions of Lord St. Leonards' Act (22 & 23 Vict. (1859) c. 35. § 3). The benefit of *covenants* was apportionable at common law.
[8] (1875) L. R. 10 Ch. App. 622.

the common law, but that it owes its existence to the statute of 1540[1]. That statute[2] provided, that the lessees should have the like remedies on covenants and conditions against the grantees of the reversion, as they would have had previously against the lessors and their representatives. And the Conveyancing Act, 1881, substantially extends the liability by providing[3], that similar remedies shall avail, not only against the actual grantees of the reversion, but against all owners of the reversion whom the covenantor has power to bind. Thus, for example, the covenants on the lessor's part contained in a lease by a tenant for life under the Settled Land Act, 1882, or by a mortgagor exercising his statutory powers, will be binding on the remainderman and mortgagee respectively, though these are not grantees of the reversion[4]. This second rule is technically expressed by saying, that 'the burden of covenants and conditions runs with the reversion.'

Benefit runs with the land.

(iii) *Subsequent acquirers of the term will be entitled to enforce it.* This is said to have been a rule of the common law; and it no doubt arises from the fact that, in its origin, a term of years was nothing more than a contract, and that, when it first became transferable, there was nothing to transfer but the benefit of the lessor's covenants. The rule is, however, confirmed by the statute of 1540[5]; and again, in the fullest manner, by the Conveyancing Act, 1881[6], which provides, that the obligation of the lessor's covenants[7] may be enforced by 'the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise.' The apportionment section of the Conveyancing Act, 1881[8], does not refer to the benefit of a lessor's *covenants*; but there

[1] 1 Wms. Saunders, 299 note (b). [2] 32 Hen. VIII. c. 34. § 2.

[3] § 11. It is worthy of note that the Conveyancing Act is silent as to a lessor's *conditions*, though the Act of 1540 expressly covers them.

[4] To a limited extent this rule had been arrived at by decision prior to the Act. See *Isherwood* v. *Oldknow* (1815) 3 M. & S. 382.

[5] 32 Hen. VIII. c. 34. § 3. Note that the power to enforce *warranties* is expressly excepted.

[6] § 11. [7] See ante, note 3. [8] § 12.

can be no doubt that the statute of 1540 [1] enables the assignee of part of the land comprised in a term to enforce them to the extent of his interest [2]. The technical form of this third rule is, that 'the benefit of covenants runs with the land.'

(iv) *Subsequent acquirers of the term will be bound by it.* Although there is no express enactment of this rule, either in the statute of 1540 or in the Conveyancing Act, there can be no doubt of its existence. It was expressly stated in *Spencer's* Case [3], and has been treated as law ever since. It even seems, that the assignee of part of a leasehold interest will be liable, at least to a certain extent, in respect of breaches committed by the person in whom the other part is vested [4]. This liability is technically expressed by saying, that 'the burden of covenants runs with the land.' Burden runs with the land.

It is obvious then, that whenever an action is brought upon a covenant contained in a lease, two questions have to be answered before the action can be allowed to proceed. In the first place, we have to ask—is the plaintiff entitled to sue? and, in the second—is the defendant liable? And an affirmative answer can only be given in either case on one of two grounds. Either the party in question must have been an actual party to the covenant, or he must have been owner of the reversion or the term at the time when the breach was committed [5]. In other words, there must have been privity of contract or privity of estate. This is so clear in the case of assignees, that the matter needs no argument. A right or a liability which accrues to *A* as an incident of an estate, can only be created while the estate exists in *A* [6]. But, in strictness, a right or liability arising directly out of covenant, is limited only by the words of the covenant. And Continuance of rights and liabilities. Assignees. Original parties.

[1] 32 Hen. VIII. c. 34.
[2] *Simpson* v. *Clayton* (1838) 4 Bing. N. C. at p. 758.
[3] (1583) 5 Rep. at fo. 16 b.
[4] *Stevenson* v. *Lambard* (1802) 2 East. 575.
[5] *Martyn* v. *Williams* (1857) 1 H. & N. 817.
[6] It can, of course, be *enforced* afterwards. *Harley* v. *King* (1835) 2 Cr. M. & R. 18.

as covenants in a lease are usually absolute, i. e. not limited to the continuance of the interests of the parties, the original parties ought to retain their rights and liabilities during the whole of the term. But the true rule, as resulting from the cases, appears to be, that whilst an interest in the premises is essential to the enforcement of a *right* arising out of a covenant annexed to the land, it is not essential to a *liability*, provided only that there be privity of contract between the parties. Thus, a lessor or a lessee who has parted with all his interest in the premises, will not be allowed to sue for a subsequent breach of covenants annexed to the land, because he has sustained no damage [1]. But a lessor or a lessee who is sued upon a breach of covenant occurring after he has parted with his interest will be liable, if the plaintiff still retains an interest [2]. A useful provision of Lord St. Leonards' Act, however, enacts [3], that the personal representatives of a lessee, after providing for any existing or known claims under the lease, and assigning the lease to a purchaser, may proceed to distribute the residuary personal estate of the deceased, without being personally liable in respect of any subsequent claim under the lease. But the rights of the lessor and his successors against the lessee's estate are expressly reserved.

Lord St. Leonards' Act.

Surrender. One special instance of assignment remains to be dealt with, viz. the surrender of a limited interest to the owner of the immediate reversion with a view to the extinguishment, or, as it is called, 'merger' of the former. In strict theory, merger takes place by operation of law, independently of the intention of the parties. But in fact, as we shall see, equitable doctrines, now binding on all courts, have considerably modified this theory.

The form of a surrender is determined by the nature of the interest surrendered. If this interest be a socage estate,

[1] *Hicks* v. *Downing* (1696) 1 Ld. Raymond 99. This was an action by a lessee against his assignee. But the reasoning would hold equally in actions by a lessor who has assigned his reversion.

[2] *Baynton* v. *Morgan* (1888) 21 Q. B. D. 101.

[3] 22 & 23 Vict. (1859) c. 35. § 27.

a deed will be required; so also if it be a term of years which can only be validly created by deed[1]. But if it be a term which can be created by word of mouth or mere writing, or if it be a copyhold interest, the surrender may be, and, in the latter case, usually is, by word of mouth[2]. A surrender made by deed is a conveyance within the meaning of the Conveyancing Act[3]; and, if appropriate terms be employed, the usual covenants for title by the surrenderor will be implied.

As we have said, the normal effect of a surrender is, to merge the surrendered interest in the immediate reversion. This merger was occasionally attended with inconvenient and unforeseen results. For example, if a sub-term had been granted out of the surrendered term, the merger of the latter would have destroyed the reversion on the sub-term and, consequently, all those remedies against the holder of the sub-term which could only be exercised by a reversioner. To remedy this inconvenience, the Act to Amend the Law of Real Property[4] provided that, when the reversion on a lease of any tenements or hereditaments of any tenure should, after October 1, 1845, be surrendered or merge, the estate which should, as against the tenant under the lease, confer the next vested right to the same tenements or hereditaments, should, for the purpose of preserving the incidents and Merger.

[1] 8 & 9 Vict. (1845) c. 106. § 3. The wording of the section is almost unintelligible. It says that 'a surrender in writing . . . shall also be void at Law, unless made by deed.' But what of a surrender by word of mouth? Probably, that would be held void both at Law and in Equity (though the Statute of Frauds does not say so), while the written surrender might have an equitable value.

[2] The actual surrender is generally preceded by a covenant to surrender, which contains the covenants for title (or their statutory equivalents) and any special terms relating to the transaction. Such a covenant is a conveyance within the meaning of the Conveyancing Act, 1881. See § 2 (v).

[3] Oddly enough, the section (2 (v)) does not mention a 'surrender,' but only a covenant to surrender. A surrender would, however, clearly be included in the phrase 'other assurance.'

[4] 8 & 9 Vict. (1845) c. 106. § 9. For a similar protection to contingent remainders, contained in the preceding section, see ante, p. 105.

obligations of such surrendered reversion, be deemed the reversion expectant on the same lease. It will be noticed, that the section covers the cases of merger arising from pure operation of law, as well as those brought about by the act of the parties. Thus, suppose *A*, seised in fee, to make a lease for ninety-nine years to his eldest son *B*, who sub-demises for twenty-one years to *C*. *A* dies intestate, leaving *B* his heir at law. It is conceived that, despite the Land Transfer Act [1], the reversion on *C*'s lease would be extinguished as soon as *A*'s personal representatives handed over the estate to *B*. But the Act of 1845 would now make *A*'s estate (vested in *B*) the reversion on *C*'s lease.

Equitable rules affecting merger.

Courts of Equity, however, went very much farther than this in restraining the operation of merger. And indeed, even at strict Law, merger will not take place in certain cases—e. g. where an estate tail and the immediate reversion in fee simple become vested in the same person, the estate tail will not merge, and a base fee will not merge, but enlarge, on becoming vested in the owner of the reversion [2]. And Mr. Justice Fry, in *Chambers* v. *Kingham* [3], seems to have thought that there was no merger, even at Law, if the smaller estate and the reversion were held in different rights, e. g. a lease as executor and the reversion as beneficial owner. Certainly in such a case there is no merger in Equity [4]. Moreover, Equity long ago declared, that where the smaller estate was held on trust, or where the junction had been produced by fraud, there would be no merger [5]. And, finally, it has been laid down in recent cases [6], that where it is to the advantage of the party in whom the two estates are vested that there should be no merger, then, in Equity, there will be none. It must

[1] 60 & 61 Vict. (1897) c. 65. §§ 1, 2.

[2] *Stafford's* Case (1609) 8 Rep. 73 b; 3 & 4 Will. IV. (1833) c. 74. § 39.

[3] (1878) 10 Ch. D. 743. See *Bracebridge* v. *Cook* (1572) Plowd. at p. 418.

[4] *Re Radcliffe*, 1892, 1 Ch. at p. 231.

[5] *Danby* v. *Danby* (1675) Ca. temp. Finch 220.

[6] *Snow* v. *Boycott*, 1892, 3 Ch. 110; *Barry Railway Co.* v. *Wimborne* (1897) 76 L. T. 489. See also *Liquidation Co.* v. *Willoughby*, 1896, 1 Ch. 726.

be remembered, that the Judicature Act expressly provided[1] that, after November 1, 1875, there should be no merger 'by operation of Law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in Equity.' In spite of the ambiguous wording of this clause, it seems to have been held to cover cases, in which the alleged merger arose by act of the parties, e. g. conveyance[2]. We may therefore lay it down, that there will now be no merger, either at Law or in Equity, and whether the union arises by legal devolution or by act of the parties, in the following cases, viz. :—

(i) Where the interests are held in different rights,

(ii) Where the union was procured by fraud,

(iii) Where it is to the benefit of the person in whom the interests are united that they shall be kept distinct,

(iv) Where the smaller interest is an estate tail or a base fee.

[1] 36 & 37 Vict. c. 66. § 25 (4).

[2] *Snow* v. *Boycott*, 1892, 3 Ch. 110.

CHAPTER XXI.

RELEASE, CONFIRMATION, EXCHANGE, AND PARTITION.

Release.

A RELEASE, though now a comparatively unimportant instrument, was at one time, as may be inferred from the length at which it is treated of in Littleton and Coke, in very frequent use. This fact seems to have been largely due to the extreme importance attributed to seisin by the old common law and, it may be added, to the apparent facility with which seisin could be acquired and lost. If a man had been *disseised*, or had never obtained seisin of land in which he claimed an estate, he was not deemed to have any interest, but only, as it was called, a *mere right*. So far was this doctrine carried, that, as we have seen [1], the lessee for years, who never, as such, obtained *seisin*, was, unless he entered and took actual possession, deemed to have no estate, but merely a contractual *interesse termini*.

To extinguish the right.

Apparently, it was the policy of the law to encourage the abandonment of rights of this description; and it is easy to imagine the motives which dictated such a policy. Accordingly, we find it laid down by Littleton [2], that any Release of rights to a person having a freehold in the land, even though the latter be merely a disseisor, will avail to extinguish the rights of the relessor [3]. It is stated by Coke, and generally

[1] Ante, pp. 77–8.

[2] Co. Litt. 265 b.

[3] A release to a disseisee (person disseised) was not effectual. ib. 267 a.

accepted as law, that an *express* Release must be by deed[1]. But there are, as he points out, several ways by which an implied Release can be effected, e. g. if the obligee on a bond make the obligor his executor. It is not easy to see how, at the present day, a similar Release could come about in respect of a right to land[2]; and it is probable that, on equitable grounds, such a Release would not be allowed to operate. On the other hand, it is probable that a merely written Release would have effect given to it as an equitable defence, provided that it satisfied the requirement of a Consideration, essential to every simple contract.

To enlarge the estate.

But, in addition to the Release which operates merely to extinguish a right, there are Releases which have the effect of conveyances, i. e. which transfer actual interests in land. The distinguishing mark of such conveyances at the common law was, that they operated without livery of seisin. They were therefore applicable only in two classes of transactions, viz. where the relessee was in possession, and where the interest intended to be conveyed lay in grant, not in livery. The typical and most important cases of the former class were the Release by which a lessor conveyed his reversion to his tenant for years (the 'Common Law Lease and Release'), and the similar conveyance by which a bargainor for years under the Statute of Uses conveyed to his bargainee (the 'Lease and Release under the Statute of Uses[3]'). In both these cases, the relessee was in legal possession; in the first by actual entry under the demise, in the second by force of the express words of the Statute of Uses[4]. There was, therefore, no necessity for transferring seisin by formal livery to the relessee, who therefore acquired the reversion by mere force of the deed

[1] Co. Litt. 264 b. The mysterious clause at the end of § 9 of the 8 & 9 Vict. (1845) c. 106, looks as though the original draft intended to include a release in the operative part of the section. But the intention was not carried out.

[2] The cases given by Coke (264 b) imply the 'tortious operation of a feoffment,' now abolished by 8 & 9 Vict. (1845) c. 106. § 4.

[3] 27 Hen. VIII. (1535) c. 10. [4] ib. § 1.

of Release [1]. And, of course, the same reasoning applied, with even greater force, if the relessee were a freehold tenant in possession. But the Release 'to enlarge the estate' (as it was technically called) was quite capable of operating when the relessee was not in possession, e. g. where there had been a feoffment to *A* for life, remainder to *B* for life, remainder to *C* in fee. Here *C* could release to *B*, *C*'s interest being a remainder, which lay in grant [2]. And, of course, such a pro-

Privity.

ceeding is equally possible at the present day. As in the converse case of a surrender, however, it is necessary that there should be 'privity' between the interest of the relessor and that of the relessee, i. e. that there should be no intervening estate to prevent the union [3]. Thus, if *A* convey to *B* for life, and *B* lease for years to *C*, who enters, and then *A* release to *C*, this Release is void, because there is no privity between *A* and *C*. The precise nature of this necessary privity was at one time a matter of dispute; it being a moot question in Littleton's day, whether a feoffee to uses could release to

Release to *cestui que use*.

his *cestui que use*. The better opinion seems to have been that he could, although there was, of course, no real tenure between them, and the interest of the *cestui que use* was protected only in Equity [4]. It is usual now for a trustee to convey in the ordinary way to his *cestui que trust*; but, on the strength of the opinion of Littleton, which was adopted by Coke [5], it is probable that a Release would suffice for the purpose. A tenant at will can take a Release of the reversion from his lessor; but a so-called tenant on sufferance cannot take a Release of the reversion, from the person entitled to eject him [6]. The conveyancing character of a Release 'to enlarge the estate' is evidenced by the rule, that such a Release, if it

[1] Co. Litt. 270 a. And it seems that this would be so, even if the tenant had been actually disseised. ib. 268 a.

[2] ib. 270 a. [3] ib. 273 a. [4] ib. 271 a.

[5] ib. 271 a.

[6] ib. 270 b, 271 a. If the relessee were a disseisor, and not merely a tenant on sufferance, he could, of course, take a Release 'to extinguish the right.'

is desired that an estate of inheritance shall pass by it, must contain the appropriate words [1].

To pass the estate.

There is a third type of Release, known as the Release 'to pass the estate,' which is used only in the case of co-ownership, where the 'privity' is of enjoyment, rather than of estate. Thus, co-parceners and joint-tenants can convey by Release to one another; and no words of inheritance are necessary to convey all the interest of the relessor [2]. But tenants in common cannot convey to one another by Release [3]. It is said that the orthodox words of an express Release are—'remise, relax, and quit claim [4].'

Confirmation.

Coke defines a Confirmation as 'a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased [5].' The latter part of the definition reminds us strongly of a Release, to which, in fact, a Confirmation bears many striking resemblances. Thus, for example, a Confirmation can be used to convey the right of the disseisee to the disseisor; in the case of a mere right it requires no words of inheritance; a Confirmation to a husband of his wife's life estate would give him an estate for his own life in remainder upon hers, in the same way as a Release without words of inheritance would have done [6]; and a Confirmation which operates to enlarge the estate requires privity, as in the case of a Release [7]. On the other hand, where a Confirmation operates merely to confirm a voidable estate, e. g. where a tenant for life leases for a term of years, and the lessee's interest, which is, of course, liable to be determined by the death of the tenant for life, is confirmed by the reversioner, there need be no privity of estate [8]. And it would appear that a Confirmation which is intended, not merely to validate, but to enlarge an estate, will require to use appropriate words, marking out the

[1] Co. Litt. 273 b, 274 b. [2] ib. 273 b. [3] ib. 200 b.
[4] ib. 264 b. [5] ib. 295 b.
[6] ib. 299 a. *Query*, would it have this effect since the passing of the Married Women's Property Acts?
[7] Co. Litt. 296 a, 300 a. [8] ib. 296 a, 308 a.

extent of the enlargement[1]. But the main difference between a Confirmation and a Release seems to be, that the former is not presumed to be intended to operate at the expense of the confirmor's estate, unless such an intention is clearly shown[2]. Thus, if the owner of a rent charge confirm the estate of the terre-tenant, he is not deemed to have given up his rent charge[3]. The appropriate words of a Confirmation are 'ratify, approve, and confirm'; and it is assumed in the books that it can only be made by deed. The effect of a Confirmation may, however, be obtained in many cases by mere conduct, owing to the operation of the doctrine of estoppel[4]. Thus, if the person entitled to avoid a voidable lease accept rent from the tenant, with full knowledge of the circumstances, he will not be allowed afterwards to eject the tenant, even though there has been no formal Confirmation of the latter's estate.

Exchange. An Exchange is a form of conveyance now little used, except in the case of advowsons or benefices[5]. As a common law conveyance, it was subject to several then remarkable features. In the first place, it was the only private conveyance by which freeholds in possession could be transferred without livery of seisin[6]. It was even said that, if both the estates to be exchanged lay in the same county, a mere oral agreement to exchange, followed by entry, was sufficient to effect the transfer; but if the lands were in different counties, a deed was necessary[7]. And now, by virtue of the combined effect of the Statute of Frauds[8] and the Act to Amend the Law of Real Property[9], every Exchange of interests in lands must be

[1] Co. Litt. 299 b. [2] ib. 297 a, 307 b. [3] ib. 305 a.

[4] ib. 352. For the subject of *estoppels in pais*, see Smith, *Leading Cases* (10th ed.), vol. ii. pp. 808-823.

[5] It is, however, clearly contemplated by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), § 3 (iii).

[6] Co. Litt. 50 a.

[7] ib. 50 b. An exchange of things which lay in grant always required a deed.

[8] 29 Car. II. (1677) c. 3. § 3. The 'exchange' is not specifically mentioned.

[9] 8 & 9 Vict. (1845) c. 106. § 3. Exception is made of an exchange of copyholds.

by deed. It is necessary to the effectiveness of an Exchange, that both parties should enter upon their respective acquisitions during their joint lives[1]; and the interests of both must be equal in legal intendment, though not, necessarily, in pecuniary value. Thus, an estate for years cannot be exchanged for an estate for life, nor a copyhold interest for a socage fee[2]. But an incorporeal hereditament may be exchanged for a corporeal hereditament, provided the interests in each case be similar in extent[3]. And a tenancy in tail after possibility is deemed, for the purposes of Exchange, to be equal to an estate for life[4]. Formerly an Exchange implied a condition and a warranty: so that, if either party were threatened with ejectment from his newly acquired lands, by defect of title arising prior to the Exchange, or as it was called, 'title paramount,' he could vouch the other to warranty. And, if he were defeated, he could recover his original tenement[5]. This right passed to the heirs of the exchanging parties, but not to their assigns[6]. By the Act to Amend the Law of Real Property[7] it was, however, provided, that an Exchange should no longer imply any condition in law; and the doctrine of warranty has long been obsolete[8]. Apparently the word 'exchange,' by which alone a transaction having the peculiar qualities of an Exchange can be validly effected[9], never implied any *covenant*[10]; but the

[1] Co. Litt. 50 b.

[2] The Settled Land Act, 1882 (45 & 46 Vict. c. 38), § 3 (iii), empowers the exchange of settled land for 'other land,' and it has been suggested that this expression (defined by reference to § 2 (10) (1)) authorizes the exchange of socage interests against copyholds or leaseholds.

[3] Co. Litt. 50 b.

[4] ib. 28 a.

[5] ib. 173 b. *Bustard's* Case (1603) 4 Rep. 121.

[6] *Bustard's* Case, at fo. 121 b.

[7] 8 & 9 Vict. (1845) c. 106. § 4.

[8] *Query*, if it has been actually abolished? The two statutes of 1833 (3 & 4 Will. IV. c. 27. § 39, and c. 74. § 14) deprived it of much of its virtue; but the warranty, as distinct from the special remedies for it, is not expressly done away with.

[9] Co. Litt. 51 b.

[10] If the Exchange contained, as it usually did, the word 'grant,' covenants for title would be implied before the Act of 1845 (8 & 9 Vict. c. 106. § 4).

definition of a conveyance in the Conveyancing Act, 1881 [1], is wide enough to include an Exchange, and there seems to be no reason why, under the provisions of that statute, covenants for title should not be implied in an Exchange, by the use of the proper forms.

Partition.

By a Partition is intended a division of the interests of co-owners into severalty. In dealing with the subject we must distinguish two matters, which are apt to create confusion if treated together. These are (1) the right to partition, (2) the methods of partition when the right is established.

Right to partition.

(1) *The right to partition.* This branch of the subject is easily disposed of. By the common law, only parceners, i. e. those who became co-owners *by inheritance*, were entitled to insist on partition [2]. And so strictly was this rule observed, that if a parcener married and had issue born, whereby her husband obtained tenancy by the Curtesy, he could not, after her death, insist on partition against the will of his co-parcener [3]. But, by a statute of the year 1539 [4], joint-tenants and tenants in common of inheritance, and, by a statute of the following year [5], joint-tenants for lives or years, were given the right to insist upon partition. Apparently, tenants by entireties could never compel partition; because the wife's rights by survivorship could not be barred [6].

Methods of partition.

Voluntary.

(2) *The methods of partition.* Where partition is effected by mutual agreement, the parties convey or release to one another in any manner suitable to the interests conveyed. The orthodox rule is, that joint-tenants convey by Release, tenants in common by Grant, and parceners either by Release or by

[1] 44 & 45 Vict. c. 41. § 2 (v).

[2] Co. Litt. 174 b. There appears to have been some little doubt about the point when Fitzherbert was compiling his *Natura Brevium* (cf. 138 A). But it is stated as unquestioned law in the preambles to the statutes of Hen. VIII.

[3] Co. Litt. 174 b.

[4] 31 Hen. VIII. c. 1. § 2.

[5] 32 Hen. VIII. c. 32. § 1.

[6] The reference to partition of husband and wife in Fitzherbert (*Nat. Brev.* 139 E) evidently alludes to cases in which husband and wife are joint-tenants or tenants in common.

Grant[1]. The precise method of allotting the respective shares may be any which the parties choose to adopt; and the picturesque examples given by Littleton[2] are quoted by way of illustration only. But the remedies open to a co-owner desirous of partition against his co-owners who refuse, have varied considerably at different times. At the common law, the remedy was the writ *de partitione facienda*[3], sometimes called *participatione facienda*[4], by which the sheriff was bidden to assign equal parts to the various parceners on the oaths of twelve men. The return of this writ, under the seals of the sheriff and the inquest, constituted the title of the parceners to their respective several shares.

Compulsory.

Writ of partition.

Apparently, the process of partition by the sheriff's jury did not work very satisfactorily in all cases; for, towards the end of the Middle Ages, we observe the gradual introduction of a new process of compulsory partition, by means of a Commission issued by the Chancellor in the exercise of his equitable jurisdiction. Mr. Spence, in his well-known book, places the introduction of the new practice in or near the reign of Elizabeth[5]. But we have instructive hints of its advent at a much earlier date. There is, for example, a petition of the middle of the fifteenth century, addressed to the Chancellor by an equitable joint-tenant, praying the court to 'make partition of the said lands and tenements[6],' there being then no remedy for joint-tenants at common law[7]. And Fitzherbert's *Natura Brevium* (printed in 1534) says expressly that 'partition may be made in the Chancery, where one of the co-parceners is in ward to the King[8].' It

Commission in Chancery.

[1] Co. Litt. 200 b. Before 1845 it was feoffment instead of Grant.

[2] ib. 165 b–167 a. [3] ib. 167 a.

[4] ib. 163 a, 31 Hen. VIII. (1539) c. 1. § 2.

[5] *Equitable Jurisdiction of the Court of Chancery*, i. p. 654.

[6] *Select Cases in Chancery* (Seld. Soc. vol. x), p. 131 (ann. 1432–1443).

[7] The statutes of Hen. VIII. were, of course, much later. But it is important to notice that Fitzherbert (*Nat. Brev.* 138 A) suggests that the common law writ once lay for all co-owners ('without *de haereditate*').

[8] *Nat. Brev.* 138 C. This kind of partition seems to have been abolished by the 12 Car. II. c. 24 (1660).

seems likely, then, that the Commission in Chancery, like so many other equitable remedies, was first introduced for exceptional cases, and afterwards generalized. At any rate, it at length so completely superseded the common law remedy, that the latter was abolished in the year 1833, without any substitute being provided[1].

Defects of Chancery partition.

But the partition by Chancery Commission, though doubtless more efficacious than either the purely voluntary partition or the common law writ, yet shared the weaknesses of both its rivals. On the one hand, it could only direct a physical division of the lands, even where, as in the famous case of the suit for partition of the Coldbath, the result of the division was materially to reduce the value of the property[2]. On the other hand, it resembled the voluntary partition described by Coke in that, in all probability[3], a partition directed by Chancery could be set aside on the petition of any parcener who had been under disability when the decree was made[4]. Moreover, even the confirmation by the Court of the certificate of the Commissioners only affected equitable rights[5]; in order to convey the legal title, the parties had to execute mutual conveyances, which added to the uncertainty and the expense.

Modern Partition Acts.

There was, therefore, ample opportunity for legislation on the subject. And, accordingly, in the year 1868[6], the first of the modern Partition Acts was passed, which, having been amended by a later statute of the year 1876[7], now regulates the remedies of persons seeking to realize interests in land

[1] 3 & 4 Will. IV. c. 27. § 36.

[2] *Warner* v. *Baynes* (1750) Ambler, 589; *Turner* v. *Morgan* (1803) 8 Ves. Jr. 143. A rent might be awarded for 'owelty' (equality) of partition; but that was a very unsatisfactory remedy.

[3] At least, if any misdealing could be proved.

[4] For the proceedings under a decree for partition on the eve of the Judicature Acts, see Daniell, *Practice of the High Court of Chancery* (5th ed.), i. 1019–1028.

[5] See the judgement of Lord Redesdale in *Whaley* v. *Dawson* (1805) 2 Sch. & Lefroy, 367. This was a suit to set aside a partition, but probably one made without suit.

[6] 31 & 32 Vict. c. 40.

[7] 39 & 40 Vict. c. 17.

vested in them as co-owners. By virtue of these Acts, any person who would, under the older law, have been entitled to bring a suit for partition [1], may bring an action asking for a sale of the property and distribution of the proceeds under the direction of the court [2]. The action of the court in dealing with such a request is governed by the following rules:—

Sale instead of partition.

(i) If, for any reason, the court thinks a sale would be more beneficial than a partition, it *may* order it [3].

(ii) If parties interested to the extent of one-half of the property request it, the court *must* order it, unless it sees good reason to the contrary [4].

(iii) If any party requests a sale, the court *may* order it, unless the other parties, or some of them, will buy him out at a valuation [5].

These alternatives appear to have caused some difficulty in interpretation; but they are not really inconsistent. When the case comes before the court, the Judge is entitled to look at all the facts, and to say, of his own motion, that there shall be a sale. It is true that a request by one of the parties is a necessary precedent to this exercise of discretion; but this requirement merely ensures that a sale shall not be directed against the unanimous wish of the parties. If the court does not take a decided view on the subject, then it is open to parties representing a moiety of the property to demand a sale; and, unless the court sees good reason to the contrary, a sale will be ordered [6]. In other words, whenever one half of the interests demand a sale, the *onus* of showing that a sale would be improper rests upon the proprietors of the other

[1] That is, virtually, any person legally or equitably (*Waite* v. *Bingley* (1882) 21 Ch. D. 674) entitled to an undivided interest *in possession* (*Evans* v. *Bagshaw* (1870) 5 Ch. 343).

[2] 31 & 32 Vict. (1868) c. 40. § 3; 39 & 40 Vict. (1876) c. 17. § 7.

[3] 31 & 32 Vict. (1868) c. 40. § 3. [4] ib. § 4. [5] ib. § 5.

[6] Where the court thought that the property could be easily divided, and that the request for a sale arose from spite, it refused a sale demanded by the owner of a moiety (*Saxton* v. *Barlley* (1879) 48 L. J. Ch. 519).

interests. Finally, if any party requests a sale, the court, though in its own independent judgement it would not have decided to order a sale, may yet do so, unless the other parties interested, or some of them, will undertake to purchase the share of the party requesting a sale. But, of course, it will be much less difficult to persuade the court to withhold an order for sale in this case than in the last [1]; although, even if the undertaking to purchase be given, the court may order a sale if it is absolutely convinced that it would be for the benefit of all parties [2]. On the other hand, the party claiming a sale is not bound to accept the offer of his opponents to buy his share at a valuation [3].

The Partition Acts of 1868 and 1876 also contain a number of very useful provisions upon the subject of absent co-owners, and shares vested in persons under disability. But these provisions belong rather to Chancery practice than to Land Law [4]. It may be remarked, however, that, with the consent of the parties whose interests will remain undivided, there may be a partition, *pro tanto* only, of the shares of those who desire partition [5]. And it has been quite recently laid down, that the absolute right of a co-owner to partition, in cases in which the provisions of the Partition Acts are inapplicable, is still beyond question [6]. Finally, it may be noted, as a point of importance in the Law of Descent, that a partition does not constitute the parties to it 'purchasers,' or, in the language of Coke [7], 'make a degree.' The parties are in as of their former estates.

[1] *Richardson* v. *Feary* (1888) 39 Ch. D. 45.

[2] *Pitt* v. *Jones* (1880) 5 App. Ca. 659.

[3] *Williams* v. *Games* (1875) L. R. 10 Ch. App. 204.

[4] By § 34 (3) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), 'causes and matters for the partition or sale of real estates' are assigned to the Chancery Division.

[5] *Richardson* v. *Feary* (1888) 39 Ch. D. 45.

[6] e. g. when the subject-matter is a party wall; *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508.

[7] Co. Litt. 273 b. Coke seems to have thought that the case would be otherwise with co-parceners if one *released* to the other; presumably on

It is perhaps necessary, in enumerating modes of alienation, to allude to Disclaimer, although it might very well be said that a Disclaimer does not affect an alienation, but prevents an alienation taking effect. It appears to be both law and common sense, that a man should not be compelled to accept a conveyance against his will. On the other hand, an inductive process of reasoning, based on tolerably wide experience, has led to the conclusion that, in the vast majority of cases, men do not refuse to accept conveyances. And so the point has remained to some extent, in an obscurity from which we may perhaps safely draw the following principles:—

Disclaimer.

No man compelled to take an interest against his will.

Presumption in favour of acceptance.

(i) *That a conveyance of an interest in land will be presumed to have been accepted by the person in whose favour it was made, even though he had no knowledge of the fact of the conveyance.*

This point was discussed in *Baker's and Butler's* Case [1], but it was not necessary to the decision. It was, however, necessary in *Smith* v. *Wheeler* [2], where the owner of a term in an advowson had conveyed it by way of trust to the defendant and another, by a conveyance of which they were not aware until after his death. After executing the conveyance, the settlor was attainted of treason, the settled property being treated as a forfeiture by the Crown, and granted to the plaintiff. But the Court of King's Bench supported the settlement, though Chief Justice Hale alone seems to have seen the weak point of the defendant's case. The decision in *Smith* v. *Wheeler* has since been followed, in the case of goods, by *Siggers* v. *Evans* [3], where a debtor assigned property by

Smith v. *Wheeler.*

Siggers v. *Evans.*

the ground that the relessee would acquire an interest which he had not before. But the rule that partition (even voluntary) does not alter the course of descent, is now accepted. *Doe* v. *Dixon* (1836) 5 Ad. & E. 834; Challis, *Real Property* (2nd ed.), p. 343.

[1] (1591) 3 Rep. 25 a.

[2] (1671) 1 Ventris, 128. The point was elaborately argued by the learned reporter (then a Justice of the Common Pleas) in the somewhat later case of *Thompson* v. *Leach* (1690, 2 Ventris, 198) against the opinion of the majority of the court, and his view was ultimately confirmed by the House of Lords.

[3] (1855) 5 E. & B. 367.

a conveyance, which the jury found to be *bona fide*, to a creditor who had, at the time, no notice of his intention.

(ii) *The person in whose favour the conveyance is made may, on becoming aware of it, refuse to accept it; and no special form of refusal is essential.*

About the first part of this statement there has never been any doubt, except, perhaps, with regard to inheritance. It has been said that nothing short of actual conveyance will get rid of an estate which comes to a man by descent. But it will be impossible, since the passing of the Land Transfer Act, 1897 [1], to contend that a man may inherit an estate against his will.

But at one time there was a theory that to an effectual Disclaimer a deed, or as it was sometimes said, a record, was necessary [2]. This extreme strictness, founded, no doubt, on feudal dislike to uncertainty of seisin, may now be considered as obsolete. It has been laid down in recent cases, that there may be good Disclaimer by conduct alone, though doubtless it is better that a deed should be executed [3].

The special powers of disclaimer belonging to a trustee in bankruptcy have been previously discussed [4]. They are exercised by a simple writing, which expresses the desire of the trustee to disclaim the property specified. If the leave of the court is not obtained, notice of intention to disclaim must be given to the parties interested [5]. The Disclaimer is filed with the rest of the bankruptcy proceedings.

[1] 60 & 61 Vict. (1897) c. 65. § 1.

[2] *Butler's & Baker's* Case (1591) 3 Rep. fo. 26 b.

[3] *Stacey* v. *Elph* (1833) 1 My. & K. 195; *Birchall* v. *Ashton* (1889) 40 Ch. D. at p. 439. If a Disclaimer is really intended, care should be taken not to use any words which imply an acceptance of the estate; *Nicloson* v. *Wordsworth* (1818) 2 Swanst. 365.

[4] Ante, pp. 252–3.

[5] Bankruptcy Rules, 1890, No. 69, and forms 119 A and 119 B.

CHAPTER XXII.

DISENTAILING ASSURANCE AND DEED ACKNOWLEDGED.

THESE are two special forms of statutory conveyance, which have superseded the old fictitious lawsuits of Fine and Recovery. They were introduced by statute in the year 1833[1], and derive their validity wholly from the terms of the statute. The Disentailing Assurance is used for the purpose of enabling a tenant in tail to convey an estate in fee simple; the Deed Acknowledged to enable a married woman to convey such interests in land as are vested in her, but are not deemed to be her separate property. The powers of a tenant in tail, and the circumstances which regulate the character of the property of a married woman, have been previously discussed. In this chapter we have but to see how the rules of law are applied in conveyancing.

Disentailing Assurance.

A disentailing assurance must be a deed, and it must be enrolled within six months of its execution in the Central Office of the Supreme Court[2]. In form it follows an assurance, with similar objects, of land of which the assurer is seised in fee simple; but, to take effect under the Fines and Recoveries Act, it must be absolute, not a mere contract to convey at a future date[3]. The terms of the 7th section of the Conveyancing Act, 1881[4], with regard to the implication of covenants for title, cover a disentailing assurance.

[1] 3 & 4 Will. IV. c. 74.
[2] ib. §§ 40, 41; 42 & 43 Vict. (1879) c. 78. § 5.
[3] 3 & 4 Will. IV. (1833) c. 74. § 40.
[4] 44 & 45 Vict. c. 41.

Protector of the settlement.

But it has been pointed out[1], that the successful operation of Fine and a Common Recovery depended entirely on the connivance of the actual tenant in possession. The Act of 1833, the object of which was not to alter the law, but merely to simplify the procedure, retains this rule, by providing that a tenant in tail in remainder, who attempts to disentail without the consent of the 'protector of the settlement,' shall create only a base fee[2]. But the 'protector of the settlement' need not necessarily be the person in actual possession of the land. For the Act empowers the person creating the estate tail in remainder to appoint any number of persons[3] not exceeding three, to be 'protectors of the settlement,' and even to give them or any one else a power of appointing their successors by deed[4]. If no such special 'protector' is appointed, the owner of the first existing life estate, even though not in actual possession of the land, is the protector[5]; and his office continues, notwithstanding alienation or incumbrance of his interest[6]. The consent of the protector to a disentailing assurance, which may be given either in the assurance itself or in a distinct deed previously enrolled[7], is absolutely at the protector's discretion, and can neither be compelled nor forbidden on equitable grounds by the court[8]. A base fee created by a tenant in tail in remainder may, with the concurrence of the protector, if any, or without such concurrence if there is no protector, be enlarged by him, or by any person who, but for the creation of the base fee, would have been actual tenant in tail[9], into a fee simple. If a married woman is protector of a settlement, her consent may be given without acknowledgement, by enrolled deed, in

[1] Ante, p. 34. [2] 3 & 4 Will. IV. c. 74. § 34. [3] ib. § 32.

[4] Such an appointment must be enrolled in the same way as a disentailing assurance; ib. § 46.

[5] ib. § 22. Life estate includes an estate for years determinable on lives, and an estate by the curtesy arising out of the estate tail or any person's interest limited by the settlement.

[6] ib. § 22. [7] ib. §§ 42-46. [8] ib. § 37.

[9] ib. §§ 19 and 35. A covenant to enlarge a base fee can be enforced; *Banks* v. *Small* (1887) 36 Ch. D. 716.

the same way as that of a *feme sole*[1]. But if her protectorship arises by virtue of an estate, then, unless the estate is her separate property, her husband must join in the consent[2].

Copyholds.

The provisions of the Act of 1833 extend to copyholds, with a few modifications. Where there is a custom to entail, the copyhold tenant in tail can disentail by surrender (if his estate is legal), or by surrender or deed (if his interest is merely equitable)[3]. A memorandum of the surrender, or the deed, is entered upon the Court Rolls; and no further enrolment is necessary[4]. The consent of the protector may, in the case of a surrender, be given by word of mouth or by deed; if the disentailing assurance is effected by deed, the protector must consent in the same or by a distinct deed, which latter must be entered on the Court Rolls, as must also a memorandum of a verbal consent to a surrender[5].

Effect of disentailing assurance.

A disentailing assurance duly executed under the Act will bar, not only estates limited subsequently to the estate tail, but even interests limited in defeasance of the estate tail[6].

Deed Acknowledged.

A Deed Acknowledged is now only required in the rare cases in which a woman desires to alienate an interest in land which is not her separate property. What these cases are, we have previously considered[7]. A deed acknowledged is a deed which has been executed by a married woman with her husband's consent[8], and as to her execution whereof she has been subsequently examined[9], apart from her husband, by a Judge[10], Master in Chancery, or a special or perpetual Commissioner[11], for the purpose of seeing that she thoroughly understands the purport of the deed, and freely enters into

[1] 3 & 4 Will. IV. (1833) c. 74. § 45.
[2] ib. § 24. The section says 'settled' to her separate use. But, presumably, her statutory separate estate would be included.
[3] ib. § 50.
[4] ib. § 54.
[5] ib. §§ 51–53.
[6] *Milbanke* v. *Vane*, 1893, 3 Ch. 79.
[7] Ante, pp. 282–6.
[8] 3 & 4 Will. IV. (1833) c. 74. § 77.
[9] ib. §§ 79, 80.
[10] Including a county court judge; 51 & 52 Vict. (1888) c. 43, § 184.
[11] 45 & 46 Vict. (1882) c. 39. § 7.

it. If the examination be satisfactory, the married woman 'acknowledges' the deed, which is then binding upon her, notwithstanding her coverture. Such an instrument is effectual, not only to dispose of actual interests, but also to release or extinguish any power which a married woman may have in regard to any land [1]. But it is not applicable to any legal estate in copyholds of which, before the Act, a married woman could dispose by surrender into the hands of the lord [2]. If a married woman attempts to dispose of an equitable interest in copyholds by surrender, she must be separately examined by the person taking the surrender [3]. A disentailing assurance executed by a married woman does not require acknowledgement [4].

When a deed is acknowledged by a married woman, the person taking the acknowledgement signs a memorandum of the fact on the deed. Formerly he signed also on a separate certificate, which latter, duly verified by affidavit, was filed among the records in the Central Office of the Supreme Court of Judicature [5]. But the certificate is no longer necessary [6].

[1] 3 & 4 Will. IV. (1833) c. 74. § 77. [2] ib.

[3] ib. § 90. The Act evidently regards separate examination as part of the normal conveyance by surrender of a married woman's legal estate in copyholds.

[4] ib. § 73. [5] 42 & 43 Vict. (1879) c. 78. § 5.

[6] 45 & 46 Vict. (1882) c. 39. § 7.

CHAPTER XXIII.

DEVISE.

Power of devise.

THE power of testamentary disposition of interests in land, though now, happily, consolidated and all but uniform, comes, historically, from many sources. Whatever may have been the law in earlier times, it is quite clear that, from the end of the thirteenth century, when the common law assumed definite shape, it was a generally accepted principle that knight-service and socage estates could not pass by Will, unless they could be brought within the terms of a special local custom [1]. Terms of years, retaining in this respect their originally contractual character, always passed to the personal representatives of the lessee, and, so soon as the binding character of a Will of personalty was recognized, could be, in effect, disposed of by testament. Although direct devises of copyholds were not recognized, until the beginning of the present century [2], in the absence of a special custom to that effect; yet the practice of surrendering copyhold tenements to the uses of the surrenderor's Will was so universally recognized, that, in some of the later cases, the judges expressed considerable doubt as to the validity of a custom which should negative the existence of such a right [3].

[1] 'Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament' (27 Hen. VIII. (1535) c. 10 pr.).

[2] 55 Geo. III. (1815) c. 192.

[3] See the cases discussed in *Doe* v. *Thompson* (1845) 7 Q. B. 897, where Lord Denman speaks of the 'all but universal deviseability of copyhold

The first substantial breach in the common law was made in the year 1540, when the pressure consequent upon the interpretation of the Statute of Uses [1] compelled the Legislature, by the Statute of Wills [2], to sanction the devise of two-thirds of a testator's knight-service lands, and of all his socage lands, by last Will and testament in writing. The Act for the Abolition of Military Tenures [3], by converting all knight-service lands into common socage, virtually rendered all fee simple interests deviseable; and the Statute of Frauds [4], by requiring the attestation of three witnesses to a devise of lands, still further simplified the law on the subject of testamentary dispositions. But the final step in this direction has been the Wills Act of 1837 [5], which, though in name only an amending statute, practically contains almost the whole law on the subject of testamentary dispositions. This law may be arranged under the following heads:—

Statute of Wills.

Statute of Frauds.

Wills Act.

(i) *Testamentary capacity.* The Act of 1837 recognized only two exceptions to the general power of testamentary disposition conferred by it [6], viz. infants [7] and married women [8]. With regard to infants, it is sufficient to say that the absolute incapacity of making a Will, imposed on an infant by the Wills Act, remains untouched at the present day. An infant cannot even appoint by Will in exercise of a power, or nominate a guardian under the statute of 1660 [9]. But, as regards married women, their testamentary capacity was left

Testamentary capacity.

Infants.

Married women.

land by surrender to the use of the Will.' But section 3 of the statute of 1815 seems to contemplate cases in which there is no right of testamentary surrender.

[1] 27 Hen. VIII. (1535) c. 10.

[2] 32 Hen. VIII. (1540) c. 1. This statute was amended by the 34 & 35 Hen. VIII. (1542–3) c. 5. The two Acts are probably the best instances of Tudor verbosity on the statute-book.

[3] 12 Car. II. (1660) c. 24.

[4] 29 Car. II. (1677) c. 3. § 5.

[5] 7 Will. IV. & 1 Vict. c. 26. [6] ib. § 3.

[7] ib. § 7.

[8] ib. § 8. It is clear, however, that there are other exceptions, e. g. lunatics and convicts.

[9] 12 Car. II. c. 24. § 8.

by the statute where it was before; and thus, subject to the statutory restriction of the Act of 1542[1], they were able, as the doctrine of the separate use developed, to extend their power of disposing by Will of their equitable interests in land[2], until the Married Women's Property Acts gave them, as we have seen[3], unfettered power of testamentary disposition over their separate property.

(ii) *Form of testament.* Every testamentary document must be in writing, signed at the foot or end thereof[4] by the testator, or by some person by his direction and in his presence. There must be present at the signing two or more witnesses, to whom, if the testator does not actually sign the Will himself, he must acknowledge his signature. Finally, each witness must 'attest and subscribe' the Will in the presence of the testator (though not necessarily in the presence of the other)[5]. No special form of attestation is necessary, but every prudent practitioner will adopt a form which shows that the requirements of the Act have been complied with; for, upon sight of such a form, the officials of the Probate Division will usually dispense with the formal proof of due execution[6].

Form. Writing. Signature. Attestation.

It is no objection to the validity of an attestation, that the attesting witness is interested in the establishment of the Will, e. g. as legatee, creditor, or executor[7]; and the fact that an attesting witness subsequently becomes incompetent to be admitted as a witness, to prove the execution thereof, is no bar to its establishment[8]. But gifts to an attesting witness,

Witnesses.

[1] 34 & 35 Hen. VIII. c. 5. § 14.

[2] *Fettiplace* v. *Gorges* (1789) 1 Ves. 46; *Hall* v. *Waterhouse* (1865) 5 Giff. 64.

[3] Ante, p. 285.

[4] This provision has been elaborately explained by the 15 & 16 Vict. (1852) c. 24.

[5] 7 Will. IV. & 1 Vict. (1837) c. 26. § 9.

[6] Of course the oath of the executor or administrator will *identify* the Will as that of the testator.

[7] 7 Will. IV. & 1 Vict. (1837) c. 26. §§ 15-17. This most important change in the law was introduced by the 25 Geo. II. (1752) c. 6, and incorporated into the Wills Act of 1837.

[8] 7 Will. IV. & 1 Vict. (1837) c. 26. § 14.

or to a person who is, at the time of the execution of the Will [1], the husband or wife of an attesting witness, are void [2].

Wills of soldiers and sailors.

To the rules of form prescribed by the Act, the only exceptions are in the cases of soldiers on actual military service, and mariners at sea [3]. These persons are expressly empowered to make Wills of personalty as they might have done before the Act, that is to say, virtually, by means of any document or even words of mouth [4], which unequivocally express their intention [5]. It seems to have been held, that even the express words of the 7th section of the Wills Act do not prevent the Will of a mariner under the age of twenty-one from receiving probate [6]. But the Navy and Marines (Wills) Act, 1865 [7], places substantial restrictions on the power of petty and non-commissioned officers, ordinary seamen and marines, being in Her Majesty's service, to make irregular Wills. And, even when the testator is not in the Royal Navy, the Board of Trade is empowered, by the Merchant Shipping Act, 1894 [8], to refuse payment of moneys in its hands, belonging to the deceased, to persons claiming under an irregular Will alleged to have been executed by him.

Effect of devise.

(iii) *Effect of a duly executed Will.* The effect of a duly executed Will is to pass, provided apt language be used, all property, including contingent, executory, and other future interests, and rights of entry, which would, but for the Will, have devolved upon the heir at law or customary heir of the testator or of his ancestor, or upon the testator's personal representative [9]. The Wills Act expressly includes estates

[1] *Thorpe* v. *Bestwick* (1881) 6 Q. B. D. 311.

[2] 7 Will. IV. & 1 Vict. (1837) c. 26. § 15. [3] ib. § 11.

[4] And it would seem that there are now no special requirements as to attestation of nuncupative Wills; the Statute of Frauds (29 Car. II. (1677) c. 3. § 19) and the Act for the Better Advancement of Justice (4 Anne (1705) c. 16. § 14) having been, to that extent, repealed by the Statute Law Revision Act, 1879 (42 § 43 Vict. c. 59).

[5] For the details of this subject, see Theobald, *Law of Wills* (4th ed.) pp. 51–6. [6] *In the Goods of M^cMurdo* (1867) 1 P. & D. 540.

[7] 28 & 29 Vict. c. 72. [8] 57 & 58 Vict. c. 60. § 177.

[9] 7 Will. IV. & 1 Vict. (1837) c. 26. § 3; including the possibility of reverter on a conditional fee (*Pemberton* v. *Barnes*, 1899, 1 Ch. 544).

pur auter vie and copyhold interests, even though the latter have not been surrendered to the use of the Will, or the testator has not been admitted tenant of them upon the court rolls[1]. But the Act does not release the persons claiming under a devise of copyholds, from payment of the fines and duties, which would have been claimable, if the devise had taken place with the old formalities[2]; and the Will must be entered upon the court rolls[3].

Land Transfer Act, 1897.

An important alteration in the effect of a devise of socage interests has, however, been effected by the Land Transfer Act, 1897[4]. By that statute it is provided, that where real estate (other than copyholds) is vested in any person, without a right in any other person to take by survivorship, it shall, on his death after December 31, 1897, notwithstanding any testamentary disposition, pass to his personal representative or representatives for the time being. This enactment, which places socage interests on the same footing as chattels real and terms of years in lands, is not intended to affect the beneficial interest in the lands devised[5], but it will make substantial alterations in the legal title. In the first place, the devisee will no longer take direct from the testator, but will only be able to make a good title after a transfer from the personal representative, which may be either by 'assent' or conveyance, according as the land is or is not upon the Land Register[6]. In the second, the personal representatives (or even one or some of them, with the authority of the court) will have power to sell the lands for payment of the testator's debts; and a purchaser from them will not be bound to inquire as to the application of the purchase money[7]. In the third place, a Will which deals with socage interests only

[1] 7 Will. IV. & 1 Vict. (1837) c. 26. § 3.

[2] ib. § 4. [3] ib. § 5.

[4] 60 & 61 Vict. c. 65. § 1. This principle had already been introduced, for trust and mortgage estates, by section 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

[5] 60 & 61 Vict. (1897) c. 65. § 2 (3). [6] ib. § 3.

[7] *Re Whistler* (1887) 35 Ch. D. 561.

will be entitled to probate, and the probate will form an essential item in the title of the purchaser. And, in the event of the death intestate of a person in whom a socage interest descendible to heirs is vested, the heir at law will have an equal right with the next of kin to receive a grant of letters of administration [1].

Speaks from death.

It was one of the most important alterations introduced by the Wills Act, 1837 [2], that the Will should, as to both real and personal estate, speak from the death of the testator. This had always been the rule with regard to personalty; but the old idea, generated by the practice prior to the Statute of Uses, that a Will was really a document declaring uses upon an existing seisin, had never wholly died out; and, as a consequence, real estate acquired after the execution of the Will could not pass by it. For the Statute of Uses could only operate, if at all, as from the time of the declaration of the use. But now the ambulatory character of a Will is complete, so far as property is concerned; the last doubt upon the subject having been removed by the Married Women's Property Act, 1893 [3], which has been held to be retrospective [4].

Construction.

(iv) *Construction of a Will.* It is obvious that, in a work like the present, no detailed account can be given, of the innumerable questions which have arisen, or may arise, upon the construction of Wills. Their possibilities are limited only by the possibilities of language; and the possibilities of language are infinite. The bulky works which have from time to time appeared on the special subject of Wills, are largely occupied with discussing questions of construction [5]; and to them the reader must be referred for an elaborate discussion of the topic. Moreover, such questions belong mainly

[1] Land Transfer Act, 1897 (60 & 61 Vict. c. 65), § 2 (4).

[2] 7 Will. IV. & 1 Vict. c. 26. § 24.

[3] 56 & 57 Vict. c. 63. § 3.

[4] *Wylie* v. *Moffatt*, 1895, 2 Ch. 116.

[5] e.g. 28 of Mr. Jarman's 51 chapters (*Wills*, 4th ed.), and 23 of Mr. Theobald's 52, appear to be mainly concerned with questions of construction. There is an excellent summary of these rules in the 51st chapter of Mr. Jarman's book.

to the litigious rather than the conveyancing side of the subject.

But there are certain leading rules on the subject of the construction of well-known phrases, which have been laid down by the Wills Act itself, and which therefore require special notice. They may be summarized as follows:— Statutory rules.

(α) *A residuary devise of real estate will include the property intended to be passed by a specific devise which, for any reason, has failed to take effect*[1]. Residuary devise.

It is the practice for every well-drawn Will to contain a clause, disposing of all the property of the testator not specially appropriated by any other part of the Will. Such a clause is almost essential to prevent a partial intestacy; for it is impossible for a man, even *in extremis*, to foresee what will be the exact state of his property at the time of his death, and the most disastrous results have followed from its omission. In the case of personalty, it has never been doubted, but that such a residuary disposition would carry property which the testator had attempted, but ineffectually, to dispose of by special bequest[2]. But the view taken of the character of devises of real estate, did not permit of the application of the doctrine to them. Accordingly if, prior to the Act[3], a testator had devised a fee simple to *A*, and made a residuary devise in favour of *B*, and *A* had predeceased the testator (whereby the devise to him lapsed), the fee simple devised to *A* would not have been included in the residuary devise to *B*, but would have gone to the testator's heir as undisposed of. The Wills Act, in effect, assimilates the rules in the two cases.

(β) *A general devise of 'land' will include freehold, leasehold, and copyhold interests; and a general devise or bequest of real or personal estate will include real or personal estate over which* Meaning of 'land.'

[1] 7 Will. IV. & 1 Vict. (1837) c. 26. § 25.

[2] *Cambridge* v. *Rous* (1802) 8 Ves. Jr. at p. 25.

[3] It must carefully be remembered that the Wills Act of 1837 only applies to the cases of Wills made after the 1st Jan., 1838, or subsequently republished.

the testator has a general power of appointment, provided that the latter can be duly exercised by Will [1].

As the law stood before the Wills Act, a devise of 'land' would only pass leasehold and copyhold interests if, when he made his Will, the testator had no freeholds to which the devise could apply [2]. The latter part of the rule is due to the conviction, that where a man has a *general* power of appointment over property, i. e. a power which he may exercise in favour of any one that he likes, he is apt to regard it and speak of it as his own. This rule may, in suitable cases, be also applied to property which the testator can only appoint to members of a special class [3].

Words of limitation.

(γ) *A devise of real estate to a person without words of limitation, will pass the whole of the testator's interest* [4].

This is one of the most conspicuous instances of the so-called 'favourable' construction of Wills. A limitation of a freehold interest by act *inter vivos* without words of limitation would, of course, only pass a life estate. It was for some time doubted whether, if there was an attempt to limit a subsequent gift over, the section would operate; but it has been very recently decided [5], that, if the intention to make an absolute gift to the first devisee be clear, directions as to subsequent disposal will be treated as surplusage.

Failure of issue.

(δ) *In every devise or bequest, the words 'die without issue,' 'die without leaving issue,' and 'have no issue,' will be construed to mean a failure of issue in the lifetime or at the death of the person referred to, and not a remoter failure of issue* [6]. Before the passing of the Act, the interpretation to be put upon such phrases was somewhat uncertain; but, on the whole, the Courts leant towards the view, that they imported an in-

[1] 7 Will. IV. & 1 Vict. (1837) c. 26. §§ 26 and 27.

[2] *Rose* v. *Bartlett* (1631) Cro. Car. 293.

[3] *Re Milner*, 1889, 1 Ch. 563.

[4] 7 Will. IV. & 1 Vict. (1837) c. 26. § 28.

[5] *Re Jones*, 1898, 1 Ch. 438. Here the gift over applied to 'such parts of my estate as (the devisee) shall not have disposed of.'

[6] 7 Will. IV. & 1 Vict. (1837) c. 26. § 29.

definite failure of issue. Such a construction, of course, rendered many limitations void for perpetuity; and there can be no doubt that the new statutory interpretation is, on the whole, beneficial. It will also be remembered that, by the operation of the Conveyancing Act, 1882, an executory limitation over on failure of issue is rendered still more precarious, by the rule that attainment of the age of twenty-one, by any of the issue referred to, makes the subsequent limitation void [1].

Devise to a trustee.

(ε) *A devise of real estate to a trustee or executor will give him the whole interest of the testator, unless a definite smaller estate be given him, either expressly or by implication* [2]. This section might seem to be a mere repetition of section 28, but for the consideration, that the purposes for which a devise in trust was given might possibly raise a presumption in favour of a more limited interest. The Act does not mean to prohibit the devise of a smaller interest, even by implication; but the implication must be clear. And it is expressly provided by a later clause [3], that where the purposes of the trust may exceed the duration of the lifetime of a beneficiary, the devise shall be construed to pass the whole interest of the testator. The operation of the two sections is to do away with devises of uncertain duration.

It should be very carefully remembered that all the above rules of construction (except, perhaps, the last) only operate 'unless a contrary intention shall appear by the Will.'

Lapse.

(v) *Lapse of testamentary dispositions.* As a general rule the death, during the lifetime of the testator, of any of the objects of his bounty, produces an absolute failure, or 'lapse,' of the provisions of the Will, so far as that person is concerned. But there are three exceptions to this rule:—

Devise in tail.

(α) A devise in tail (or in quasi-tail) to a person who dies in the testator's lifetime, leaving issue capable of inheriting under the entail, and who survive the testator [4].

[1] Conveyancing Act, 1882 (45 & 46 Vict. c. 39), § 10.
[2] 7 Will. IV. & 1 Vict. (1837) c. 26. § 30. [3] ib. § 31. [4] ib. § 32.

Devise to issue of testator.

(β) A gift (whether of realty or personalty) to a child or other issue of the testator, who dies in the latter's lifetime, leaving issue who survive the testator [1].

In both these cases, the devise or bequest will take effect as if the original devisee or legatee had died immediately after the testator. But the result of this rule will not be the same in both cases. As a man cannot bar an estate tail by his Will, and as he cannot, of course, in any way bar an estate tail which is not vested in him, his issue will, in the first case, necessarily inherit the estate tail. In the second, however, the gift may pass by the Will of the original devisee or legatee, if it is wide enough to include the property. For such Will, as to the property comprised in it, speaks from the death of the original devisee [2], which, *ex hypothesi*, has taken place just after that of the original testator. The working out of this elaborate fiction occasionally gives rise to curious problems [3].

Devise to a charity.

(γ) Where there is a gift to a charity which comes to an end after the testator's death, but before payment, the gift does not lapse, but goes to the Crown to be used *cy-près* [4].

This is not, of course, a true exception to the rule; for there can be no genuine lapse unless the donee predeceases the testator. But it has been suggested (at present without success) that the doctrine might be extended, to cover cases in which the charity had come to an end before the testator's death [5].

It must be understood, in all cases, that it is the beneficial donee whose death causes a lapse. A devise will never lapse for want of a trustee [6]. The death of one or more of joint-

[1] 7 Will. IV. & 1 Vict. (1837) c. 26. § 33. It has been held that the issue which survives the testator need not be living at the death of the original devisee (*In the goods of Jane Parker* (1860) 1 Sw. & Tr. 523). But the case was not argued, and the decision seems to override the plain words of the section.

[2] ib. § 24.

[3] See, for example, the case of *Jones* v. *Hensler* (1881) 19 Ch. D. 612.

[4] *Slevin* v. *Hepburn*, 1891, 2 Ch. 236. As lands may now be devised to a charity, the rule is very important.

[5] *Rymer* v. *Stansfield*, 1895, 1 Ch. 19.

[6] *Elliot* v. *Davenport* (1705) 2 Vern. 521. The decision of the M. R. was not overruled on that point.

tenants under a devise, in the lifetime of the testator, will not prevent the others taking by survivorship[1]; but the death of a tenant in common under a devise, in the testator's lifetime, causes a lapse of his share[2].

(vi) *Revocation of a Will.* The Wills Act of 1837 made substantial alteration in the law affecting the revocation of Wills. By its terms, the following four circumstances alone operate as revocations; and any one of them is by itself sufficient for the purpose. Revocation.

(α) *Marriage of the testator,* whether followed or not by the birth of issue[3]. The only exception to this rule is the case of a Will made in exercise of a power of appointment, where the property thereby appointed would not, in default of appointment, have gone to the testator's real or personal representatives. Marriage.

(β) *A subsequent Will or codicil duly executed*[4]. For the purposes of English law, it may be observed, there is no difference between a Will and a codicil, so far as formalities are concerned[5]. But a revocation by subsequent Will or codicil only operates to the extent which is necessary to give effect to the terms of the later document[6]. Subsequent Will.

(γ) *A writing, executed as a Will, and declaring an intention to revoke*[7]. Writing of revocation.

(δ) *A destruction of the Will* ANIMO REVOCANDI, *either by the testator, or by some person in his presence and by his direction*[8]. It is necessary to notice that, under this head, the statute prescribes always a concurrence of two acts, one mental, the other physical. The mental act, the intention to revoke, must always be that of the testator; and, if it be not there, Destruction *animo revocandi.*

[1] *Morley* v. *Bird* (1798) 3 Ves. Jr. 629.
[2] *Windus* v. *Windus* (1856) 6 De G. M. & G. 549.
[3] 7 Will. IV. & 1 Vict. (1837) c. 26. § 18.
[4] ib. § 20. [5] ib. § 1.
[6] *Re Wilcock,* 1898, 1 Ch. 95. But a revocation executed under a mistaken apprehension as to its effects will, nevertheless, operate (*Collins* v. *Elstone,* 1893, P. 1).
[7] 7 Will. IV. & 1 Vict. (1837) c. 26. § 20. [8] ib.

there can be no revocation by destruction [1]. The physical act may be that of the testator, or of any person directed by him; but, in the latter case, the direction must be carried out in the testator's presence. Thus neither (*a*) intention to revoke without destruction [2], nor (*b*) destruction without intention to revoke [3], nor (*c*) intention accompanied by destruction out of the testator's presence or without his direction [4], will be sufficient.

No revocation by

And it is expressly provided by the Wills Act, that the following facts shall *not* effect a revocation:—

Change of circumstances,

(*a*) *Any alteration of circumstances*, which might raise a presumption of intention [5];

Informal alteration,

(*β*) *Any obliteration, alteration, or interlineation* in a Will, not being duly executed as a testamentary document, except so far as such alteration prevents the original meaning being apparent [6];

Subsequent dealings.

(*γ*) *Any subsequent dealing with the property comprised in the Will*, except so far as the same shall have ceased to be alienable by the testator at the time of his decease [7].

A Will, once duly revoked, cannot be revived by any act short of re-execution with due formalities, or of the execution of a codicil showing an intention to revive the Will. And when there has been a partial revocation, followed by a total revocation, and that again by a revival, the revival will not operate to revive the part first revoked, unless an intention to the contrary be shown [8].

Finally, it may be pointed out, that the general rule is, that a Will of land must conform to the requirements of the law in force in the place in which the land is situate [9], and that

[1] *Mills* v. *Millward* (1889) 15 P. D. 20.
[2] *Stephens* v. *Taprell* (1840) 2 Curt. 458.
[3] *Brunt* v. *Brunt* (1873) L. R. 3 P. & M. 37.
[4] *In the goods of Dadds* (1857) Dea. & Sw. 290.
[5] 7 Will. IV. & 1 Vict. (1837) c. 26. § 19.
[6] ib. § 21. Alterations may be executed and attested, either in the margin or by a memorandum at the foot.
[7] ib. § 23. [8] ib. § 22.
[9] Including leaseholds (*Duncan* v. *Lawson* (1889) 41 Ch. D. 394).

a Will of personalty must be in accordance with the law of the testator's domicile at the time of his decease[1]. But a Will of personalty made outside the United Kingdom, by a British subject who dies after August 5, 1861, will be entitled to probate (or confirmation) in any part of the United Kingdom, if made according to the law of either (*a*) the place where it was executed, (*b*) the place where the testator was domiciled when it was executed, (*c*) the place (being within Her Majesty's dominions) where the testator had his domicile of origin[2]. And a Will of personalty made within the United Kingdom by a British subject will be *prima facie* valid, if executed according to the law of the place where it is made[3]. A subsequent change of domicile will not invalidate a Will once duly made[4].

[1] *Enohin* v. *Wylie* (1862) 10 H. L. C. 1.
[2] 24 & 25 Vict. c. 114. § 1. [3] ib. § 2. [4] ib. § 3.

CHAPTER XXIV.

MORTGAGE.

Definition.

A MORTGAGE may be defined as, a conveyance to secure the payment of money or money's worth. For the purposes of this chapter, a mortgage means a conveyance of an interest in land having such an object. In the great majority of cases, the mortgage is intended to secure the repayment of money lent at the time when the mortgage is effected; but such a state of circumstances is not essential to the creation of a valid mortgage. *A* may be indebted to *B* on a long course of commercial dealing, in a definite or unascertained sum, and may give to *B* a mortgage upon his interest in land, to secure the payment of what shall ultimately be found due from him (*A*). It is conceivable that such a mortgage might be objected to as 'voluntary' or 'preferential' under the Bankruptcy Act; but, apart from such a contingency, it would be a perfectly valid mortgage, and would be treated by the Court as a security for payment of money.

Character a question of fact, not of words.

It has long been a firmly established doctrine, that the character of a transaction which is alleged to be a mortgage, is to be gathered by the Court from a survey of the whole circumstances. The mere expressions of the parties, though of importance, will not outweigh the influence of more cogent facts. The parties may call their transaction a sale with an option to repurchase, or a lease, or a speculation on each other's lives, or anything else they please; but if, on a view of the whole circumstances, the Court should take the view, that the real object of the transaction was to secure the

payment of money, the transaction will be treated as a mortgage. Thus, in the very recent case of *Salt* v. *Marquess of Northampton* [1], the eldest son of a peer had borrowed of an insurance company a sum of £10,000, and, to secure the advance, had mortgaged lands to which he was entitled as heir of entail according to Scots law. But, as this security would have been worthless in the event of the borrower predeceasing his father, the insurance company stipulated that they should be allowed to insure against such a contingency to the extent of £34,500, the borrower paying, or agreeing to pay, the necessary premiums. The event happened, and the question arose, who was entitled to the balance of the policy money, after deduction of the amount of the loan and interest. It was admitted by the insurance company, that they could not call upon the borrower's representatives for payment of the loan, and also retain the policy money. But they claimed to treat the policy as belonging absolutely to themselves. The House of Lords, however, confirming the decision of two other Courts, held that, although the borrower never had any legal interest in the policy, although he had never actually paid premiums, and although, as a matter of fact, the insurance company had effected the policy with itself [2], yet the balance of the policy money, after repayment of the loan, belonged to the estate of the deceased borrower. In other words, the effecting of a policy by the lender at the borrower's expense, was treated as a mortgage of the policy by the borrower. A stronger decision could not well be imagined [3]; and it must be deemed to have settled beyond

Salt v. *Marquess of North-ampton.*

[1] 1892, A. C. 1.

[2] So that, apparently, the lender had to pay the borrower's representatives a large sum of money out of its own funds. But this was because it acted in the dual capacity of lender and insurer. And, doubtless, its risk was largely covered by re-insurance.

[3] The decision is strong, not merely on account of the circumstances of the case, but also on account of the attitude of the judges. Of the nine judges who heard the case, only two supported the contention of the insurance company; and, of the majority, one eminent judge voted against his strongly expressed inclinations, holding the doctrine to be too clear to be overruled.

question the doctrine, that the character of a mortgage is to be determined by the whole circumstances of the case, not merely by the expressions of the parties.

Peculiarities of mortgages.

The extreme importance of determining that a particular transaction falls into the category of mortgages, arises from the fact, that a long series of statutes and decisions has impressed upon every such transaction certain striking qualities, which distinguish it from other legal transactions. Some of these qualities are particularly favourable to the borrower; others are impressed in the interest of the lender, or purchasers from him. But, whatever be their object, their results are so important, that it is essential to discover whether they are present in any given case. Foremost among them is the rule, from which, indeed, almost all other rules respecting mortgages have directly or indirectly arisen, that a mortgage cannot be made irredeemable, save by a decree of the Court [1]. The firm establishment of this rule, which can be traced back into the sixteenth century [2], has resulted in the corollary, that a *mortgagor*, i.e. a person who has conveyed an interest to secure the payment of money, retains, notwithstanding his conveyance, an interest in the subject-matter of the mortgage, which can be treated by him for many purposes in the same manner as an actually existing estate. This is called the mortgagor's *equity of redemption*; and it has long been the policy of courts of Equity to convert the equity of redemption, originally a mere personal privilege, into a substantial objective interest. For a long time, courts of Law steadily refused to recognize the interest of the mortgagor, with the result, that mortgage cases gradually became the exclusive specialty of the Court of Chancery, which proceeded to elaborate a complicated doctrine on the subject. 'The Chancery rules were definitely incorporated into the common law by the

Once a mortgage always a mortgage.

Equity of redemption.

[1] This was expressly laid down in *Newcomb* v. *Bonham* (1683, 1 Vern. 7) by Lord Nottingham, who adopted the phrase—'once a mortgage, always a mortgage.'

[2] See the fragmentary reports of cases on Mortgages in Tothill, *Transactions of the High Court of Chancery*, p. 134.

Judicature Act, and must, therefore, be officially recognized by all branches of the Supreme Court[1]. But obvious motives of convenience have caused mortgage cases to be 'specially assigned' to the Chancery Division[2]; and the break in the history of mortgage doctrines is, therefore, more apparent than real.

It will be evident from this brief introduction to the subject, that every validly effected mortgage creates two distinct interests. The first of them is that of the *mortgagee*, or person to whom the conveyance for securing payment of money is made. The second is that of the mortgagor, or the person making the conveyance with a similar object. The first is deliberately created by the act of the parties, and is, subject to certain minor reservations, just what they choose to make it; the second is a creature of Equity, arising without expressed intention of the parties, and governed for the most part by rules beyond their control. It will simplify matters if we deal first with the actual form of mortgages, and then, separately, with the respective interests of the mortgagee and mortgagor.

Form of mortgage.

Form of a mortgage. It is now, as has been said, the almost universal practice to effect a legal mortgage by an absolute conveyance to the mortgagee, followed by a personal covenant, contained in the mortgage deed, for reconveyance of the mortgaged premises, on payment of the principal and interest on a day fixed. The precise form of the conveyance, therefore, will depend upon the nature of the property to be conveyed, e. g. whether it is socage, leasehold, or copyhold, corporeal or incorporeal. In other words, a mortgage is only a sub-species of conveyance; and is, therefore, properly described in the Conveyancing Act, 1881, as a 'conveyance by way of mortgage[3].' So clearly is this the case, that the Act contemplates the use of the same technical words ('as beneficial owner'), whether the conveyances be absolute (in the strictest

[1] 36 & 37 Vict. (1873) c. 66. § 24. [2] ib. § 34 (3).
[3] 44 & 45 Vict. c. 41. § 7 (c).

sense) or by way of mortgage; and this notwithstanding that, as we shall see, the covenants implied against a mortgagor conveying 'as beneficial owner' are substantially different from those implied against an ordinary vendor. This rule is another striking illustration of the doctrine, that the character of a mortgage is to be determined by the whole circumstances of the case, not by the language of the parties.

It might be assumed, then, that, to effect a mortgage, the conveyancer had merely to select the kind of conveyance applicable to the absolute alienation of the property to be mortgaged, adding to it, for form's sake, the usual proviso for redemption[1]. And this is true of most mortgages. But there is one important exception. If a mortgagor offers as his security a leasehold interest, it may be prudent in the mortgagee's advisers to decline to accept a conveyance of the whole term, for such a course would render the mortgagee liable, by creating 'privity of estate' between them, to the lessor, for breaches of covenant taking place while the term was vested in him (the mortgagee). It is usual, therefore, at any rate where the leasehold interest is subject to substantial liabilities, for the mortgage to be created by *sub-demise*; that is, the mortgagor demises to the mortgagee the premises comprised in his own lease, for the residue of his term, *minus* a few days. To this sub-demise no rent or covenants (other than the usual proviso for redemption) are annexed; and it is therefore of greater value to the mortgagee than a slightly longer term with substantial liabilities. And it is usually assumed that, nothwithstanding that such an arrangement technically creates the relation of landlord and tenant between mortgagor and mortgagee, none of the legal consequences attaching to that relationship would be allowed to affect the

Mortgage by sub-demise.

[1] It is conceived that there is no absolute necessity for the insertion of the proviso for redemption. Any other circumstance which indicated the character of the transaction would serve to make it a mortgage. But the clause is useful (*a*) as stamping unmistakeably the mortgage character of the transaction, (*b*) as fixing the date from which the statutory powers of sale and receivership can be exercised by the mortgagee.

mortgagee's interest [1]. On the other hand, the existence of the superior term in the mortgagor does, undoubtedly, constitute a danger to the mortgagee, despite the statutory provisions designed to protect sub-lessees. But this danger is, to a large extent, obviated by the practice of making the mortgagor declare himself a trustee for the mortgagee of the reversion upon the sub-term, a practice which constitutes the mortgagee equitable owner of the reversion, and enables him to interfere to protect it from harm. Perhaps there is a still more substantial protection in the fact, that the mortgagee invariably obtains the title-deeds of the mortgagor's interest.

The interest of the mortgagee.

Interest of the mortgagee.

The interest of the mortgagee is either legal or equitable, absolute or conditional, permanent or temporary, corporeal or incorporeal, in fee, for life, or for years, as the conveyance makes it. A mortgagor who has only an equitable interest cannot, and a mortgagor who has a legal interest need not, convey a legal interest to the mortgagee. But the typical mortgagee's interest is a legal one; and it will conduce to simplicity if we assume, for the present, that such is the case. We may afterwards consider the subject of equitable mortgages.

At common law.

The old forms of legal mortgages usually adopted the plan of conveying the interest to the mortgagee, upon a condition for re-entry or defeasance by the mortgagor, on payment of the mortgage money on a fixed day [2]. These conditions were strictly construed by courts of Law; and, upon the non-performance of the condition on the day named, the right of the mortgagor was absolutely gone. A court of Law had no power, if it had the wish, to help him.

Still more ineffectual was a court of Law, to restrain the powers of a legal mortgagee, when the change came in of

[1] Any attempt on the part of the mortgagor to impose liabilities on the mortgagee as lessee would, of course, defeat its own object, as the expenses of such liabilities would be a charge on the mortgaged property. But it is unlikely that the Court would even recognize their existence.

[2] Co. Litt. 205 a.

making mortgages by absolute conveyance, subject to a personal covenant for reconveyance by the mortgagee, on payment of the mortgage money. By this plan, which, as we have said, is that now universally adopted, the mortgagor conveys the lands to the mortgagee as fully as though the intended transaction were an out and out sale, and gives the mortgagee an absolute interest. Subsequently, the mortgage document contains a personal covenant by the mortgagee that, upon payment of the mortgage money, he will reconvey the premises to the mortgagor. By the common law, such a transaction was an absolute conveyance, with a personal contract annexed to it; and this contract could only be enforced in the ordinary way, viz. by an action for damages against the contracting party or his representatives. Even if the mortgagee or his representatives remained owner of the premises, a court of Law could not compel him or them to reconvey [1]. If the mortgagee had sold the premises, the Court was equally powerless; for such a covenant did not 'run with the land' at Law, at any rate where the mortgagee's interest was a freehold [2].

In Equity. But the weaknesses of the courts of Law were amply remedied by the Court of Chancery, which treated the covenant for reconveyance (or, as it is usually but not very correctly called, the 'proviso for redemption') not merely as a covenant running with the land, but as a substantial restriction upon the legal powers of a mortgagee. In the view of a court of Equity, the existence, express or implied, of the proviso for redemption, coloured the whole transaction, and made it something entirely different from that absolute conveyance, as which the courts of Law persisted in treating it—made it, in fact, a mortgage.

[1] In very old law there seems to have been a writ (of *Covenant Real*) which would have given the courts of common law power to order reconveyance. But the remedy disappeared long before the end of the Middle Ages (Fitzherbert, *Nat. Brev.* 323 A).

[2] If the mortgage had been by sub-demise, it would probably have run with the sub-term.

The result of this doctrine was twofold. In the first place, all persons claiming under the mortgagee, whether by purchase or descent, were bound by the existence of the proviso for redemption, which, owing to the equitable doctrine that time is not of the essence of a contract, except in special cases, could be enforced at any time by the mortgagor or his representatives. To this rule the only substantial exception was that of a purchaser for value, who had acquired the legal interest of the mortgagee without notice (express or implied) of the existence of the covenant for redemption. In such a case, the purchaser would be protected by the general rule which, in the equality of moral claims, prefers legal to equitable interests. But, in the nature of things, it is very seldom that a purchaser can acquire from a mortgagee without notice of the equity of redemption. In the second place, the exercise of his legal powers of management and enjoyment by the mortgagee, was hampered at every turn by the haunting shadow of the equity of redemption. If he took possession of the land (as, where his interest was a present legal estate, he had a legal right to do) he had to manage the land, not only in his own interests, but in those of the mortgagor. If he granted a lease, it would not be valid after redemption. He would be restrained from committing Waste, except, perhaps, where his security was otherwise insufficient. It was, in fact, the great object of Equity to constitute the mortgagee in possession a *trustee* for the mortgagor; and, though this result was never technically achieved, and although there is at the present day a substantial difference between an actual trustee and a mortgagee, yet the latter undoubtedly occupies a quasi-fiduciary position, which renders him amenable to many of the liabilities of a trustee.

Special powers of mortgagee.

So far, in fact, did Equity go in protecting the mortgagor, that mortgagees found it impossible to rely, for their own security, upon the legal powers vested in them as owners of the mortgaged premises. Accordingly, the practice grew

up, in the seventeenth and eighteenth centuries, of introducing into mortgages special covenants and powers, designed for the protection, not of the mortgagor, but of the mortgagee. The Court of Chancery at first regarded these clauses with a jealous eye, and always insisted upon the right to quash any of them, as inconsistent with the fundamental character of a mortgage[1]. But as it gradually dawned upon the consciousness of Chancery judges, that a mortgage was not necessarily a cover for oppression, and further, that neglect of the just claims of mortgagees only led to the imposition of harder terms upon borrowers, this jealousy was somewhat relaxed. And ultimately the Legislature, which had hitherto confined itself to the direct protection of debtors, began to confer upon mortgagees, as a matter of general right, those powers and protections which the latter had been seeking to acquire in special cases by express stipulation. The first attempt on a large scale in this direction seems to have been

Lord Cranworth's Act.

Lord Cranworth's Act of 1860[2], which, presumably, still affects all mortgages made by deed executed between August 27, 1860[3], and January 1, 1882[4], and which conferred upon every mortgagee under such a deed substantial statutory powers of sale, insurance, and appointment of a receiver, the exercise of which is unaffected by the existence of a proviso for redemption. But the powers conferred by Lord Cranworth's Act have been substantially enlarged, as respects mortgages created by deed executed after December 31, 1881, by the Conveyancing Act of that year, to which special attention must be devoted.

Conveyancing Act.

By the Conveyancing Act of 1881[5], every mortgagee by deed has, as incident to his estate, the following powers:—

[1] *Howard* v. *Harris* (1680) 1 Vern. 190.

[2] 23 & 24 Vict. c. 38. §§ 11-24. There had been a hesitating attempt by the abortive Act of 1844 (7 & 8 Vict. c. 76), § 10. But this had been abolished by the 8 & 9 Vict. (1845) c. 106.

[3] 23 & 24 Vict. (1860) c. 38. § 34.

[4] The date of the coming into operation of the Conveyancing Act, 1881.

[5] 44 & 45 Vict. c. 41.

(1) *Sale.* After the mortgage money has become due, the mortgagee may sell the mortgaged property in any way that he may think fit; and a purchaser from him will not be bound to make any inquiry as to the regularity of the sale[1]. The mortgagee may convey the property so sold free from all incumbrances subsequent to his mortgage; and his receipts and other incidental acts will be binding on the mortgagor, and upon subsequent incumbrancers[2]. If he chooses to pay off previous incumbrances, he can convey an absolutely unincumbered interest to the purchaser[3]. Sale.

As between himself and the mortgagor, however, the mortgagee must not exercise his statutory power of sale until one of three instances of default by the mortgagor has occurred, viz.:—

(α) that the mortgage money has not been paid off for more than three months after notice,

(β) that interest is in arrear for two months,

(γ) that one of the mortgagor's provisions in the mortgage (other than the covenant for payment of principal and interest) has been broken[4].

A mortgagee who sells before such default has happened, will be personally responsible in damages to the mortgagor, and any one else damnified by the irregularity[5]; and, probably, a purchaser who bought *knowing* of the irregularity, would be liable to have his purchase set aside[6]. As between the mortgagee and the mortgagor, the effect of a sale is to substitute the purchase money for the mortgaged property; and the mortgagee will be under the same equitable liabilities with regard to the money, as he was previously with regard to the land[7].

[1] 44 & 45 Vict. (1881) c. 41. §§ 19 (1), 21 (2). [2] ib. § 21 (1).

[3] ib. § 21 (3). At least, this is the view taken by Messrs. Wolstenholme & Turner (*Conveyancing Act*, 3rd ed. p. 68).

[4] 44 & 45 Vict. (1881) c. 41. § 20. [5] ib. § 21 (2).

[6] *Jenkins* v. *Jones* (1860) 2 Giff. 99. See also *Selwyn* v. *Garfit* (1888) 38 Ch. D. 273. In both these cases the power of sale was *express*.

[7] 44 & 45 Vict. (Conveyancing Act, 1881) c. 41. §§ 21 (3), 22 (2).

Insurance. (2) *Insurance.* A mortgagee may at any time insure against fire any insurable things forming part of the mortgaged property, and charge the expenses on the security. But the amount for which he may insure is limited to the sum fixed for that purpose by the mortgage deed, or, if there is no such provision, to two-thirds of the amount which it would cost to replace the insured things after total destruction [1]. And the power to insure cannot be exercised at all if one of the three following conditions exists:—

(i) the mortgage declares that no insurance is required,

(ii) an insurance is kept up by the mortgagor in accordance with the requirements of the mortgage,

(iii) an insurance of the proper amount is voluntarily kept up by the mortgagor [2].

If a loss occurs, the mortgagee may either have the insurance money expended in restoring the premises, or paid towards the discharge of his mortgage money [3].

Receiver. (3) *Appointment of receiver.* At any time after the mortgage money becomes due, the mortgagee may appoint a receiver, who is to be deemed the agent of the mortgagor [4], and is to have full power to collect the rents and profits of the property [5], and, after paying outgoings and charges having priority to the mortgagee's claim, to keep down the interest on the mortgage, but not to accumulate the surplus towards reduction of the principal. The surplus will go to the mortgagor or subsequent incumbrancers. A receiver appointed by the mortgagee may be dismissed, and a new one appointed, at the mortgagee's pleasure [6].

The exercise of the power of appointing a receiver is subject

[1] 44 & 45 Vict. (Conveyancing Act, 1881) c. 41. § 23 (1). [2] ib. § 23 (2).

[3] ib. § 23 (3) (4). It seems likely, on principle, that the mortgagee's claim to control the insurance money only exists where the insurance has been effected, or at least continued, as the result of the mortgage.

[4] The convenience of this rule (apart from obvious advantages to the mortgagee) is, that it enables the mortgagee to obtain most of the practical benefits of possession without its liabilities.

[5] Including a power of distress.

[6] 44 & 45 Vict. (1881) c. 41. § 24.

to the same restrictions as to default, on the part of the mortgagor, as the exercise of the power of sale [1].

Furthermore, a mortgagee who has *taken possession* of the mortgaged premises, has the following additional statutory powers :—

(4) *To cut timber.* The mortgagee in possession may not only cut and sell timber from time to time, but may contract for the future cutting during a period not exceeding twelve months. But he must not cut timber planted or left for shelter or ornament [2]. Timber.

(5) *To grant leases.* A mortgagee not in possession could not, before the Act, and cannot now, create valid leases; because he cannot directly confer possession upon the lessees. A mortgagee in possession before the Act could, independently of express stipulation, grant any leases he pleased; but they would have been liable to be set aside on redemption of the mortgage by the mortgagor, as inconsistent, in the view of Equity, with the nature of the mortgagee's interest [3]. The Conveyancing Act, 1881, enables a mortgagee in possession to grant occupation leases for periods not exceeding twenty-one years, and building leases for periods not exceeding ninety-nine, which will be binding on the mortgagor even after redemption [4]. The Act contains numerous careful stipulations as to the character of the leases to be granted under this statutory power; but they virtually amount only to this, that a mortgagee exercising his power of leasing must act as a prudent administrator of his own property would do [5]. It must, of course, be understood, that the statutory power is intended to operate as between mortgagor and mortgagee only. A mortgagor cannot, by mortgaging his estate, confer upon his mortgagee a greater power to grant leases than he himself had [6]. A mortgagee in possession is not bound to pay surplus Leasing.

[1] 44 & 45 Vict. (1881) c. 41. § 24 (1). Ante, p. 383. [2] ib. § 19 (4)
[3] *Hungerford* v. *Clay* (1722) 9 Mod. 1.
[4] 44 & 45 Vict. (1881) c. 41. § 18 (3). [5] See subsections (5)-(15).
[6] For example, the owner of a term of eighty years could not, by mortgaging it, enable his mortgagee to lease for ninety-nine.

income to the mortgagor or subsequent incumbrancers; but may carry it to the credit of his principal claim, the amount of the latter being reduced by annual 'rests'.[1]

It will thus be seen that mortgagees are provided by statute with very substantial powers to enable them to realize their securities. To such extent is this, indeed, the case, that the Conveyancing Act contemplates the adoption by conveyancers of short forms of mortgages, which will dispense with the necessity for the repetition, not only of the covenants for title, but of the powers and provisoes formerly inserted for the protection of mortgagees[2]. But it should be remembered, that the statutory powers of the Act may be either extended or restricted at the option of the parties; and so the interest of a legal mortgagee is still, despite the existence of statutory powers, just, as was previously said, what the parties choose to make it.

Covenants for title by a mortgagor.

With regard to covenants for title, it may be observed, that a mortgage by a person who is expressed to convey 'as beneficial owner'[3] confers upon the person to whom the conveyance is made, not merely the ordinary covenant rights of a purchaser for value, but absolute rights as against the mortgagor and his representatives, that the mortgagor's title is what it is represented to be[4]. Furthermore, a mortgage of leaseholds, accompanied by similar expressions, implies an absolute covenant by the conveying party, to perform the covenants of the lease during the continuance of the security[5]. Where a mortgage is not made by deed, it is clear that neither the covenants for title, nor the statutory powers of

[1] *Thorneycroft* v. *Crockett* (1848) 2 H. L. C. 239.

[2] For example, see Appendix B.

[3] Ante, p. 317. The statutory form sanctions the expression 'as mortgagor.'

[4] Conveyancing Act, 1881 (44 & 45 Vict. c. 41.) § 7 (C) (D).

[5] ib. (D). It should be noticed that a mortgage by sub-demise may imply covenants for title under the Conveyancing Act, such transaction not being 'a demise by way of lease at a rent' (ib. § 7 (5)).

the mortgagee, can be held to be implied[1]. But, in the nature of things, a *legal* mortgage is hardly ever effected without deed. As regards socage and leasehold interests, a legal mortgage without deed would only be effectual to pass the legal estate, in the case of the brief interests excepted by the 1st section of the Statute of Frauds; and these have no mortgageable value. In the case of copyholds, although a mortgage might, strictly speaking, be made by oral surrender, it is usual for this formal act to be preceded by a covenant to surrender, which is not acted upon unless it is desired to enforce the security. It has been suggested[2], that such a covenant to surrender would not constitute a mortgage by deed; but it is submitted that it would confer upon the mortgagee the powers of section 19, though, possibly, it would not enable him to convey directly the legal estate.

Foreclosure.

Finally, it should not be forgotten, that the mortgagee may prefer not to realize, but to accept his security in discharge of his claims against the mortgagor. According to the express terms of the mortgage, he needs no assistance in carrying out this desire; for he is already legal and absolute owner of the premises. But it has long been the firmly established doctrine of Equity, that he cannot finally rid himself of the mortgagor's privilege of redemption, until that privilege has been formally abolished by the Court. It is necessary, therefore, for a mortgagee who wishes to make himself absolute owner of the mortgaged premises, to commence an action in the Chancery Division, against the mortgagor and all other persons interested in the property, asking that an account may be taken of what is due to him for principal, interest, and costs, and that, upon failure of the mortgagor to pay this amount within a specified time (usually six months from the date of the Master's certificate) they may be declared barred

[1] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), §§ 2 (v), 7 (A), 19 (1). It is a little doubtful if the leasing powers apply only to mortgagees by deed. But § 18 (14) favours the affirmative view.

[2] Wolstenholme & Turner, *Conveyancing Acts*, 3rd ed. p. 67.

for ever of all right of redemption. Ordinarily speaking, this claim is a matter of right [1]; but its exercise may be defeated by at least two contingencies:—

Redemption. (i) The offer of any person interested in the equity of redemption to pay off the mortgagee, at any time before the date finally fixed by the decree [2].

Sale. (ii) The decision of the Court, made upon the application of any party interested, to order a sale instead of a foreclosure [3].

But a mortgagee who obtains a foreclosure decree, loses all claim on the personal covenant of the mortgagor for payment of the mortgage money, while a mortgagee who sells and does not realize sufficient by the sale to discharge his claim, may proceed personally against the mortgagor for the balance [4]. An action for foreclosure is an action to recover land, and, if the mortgagee is not in possession, must be brought within twelve years after the right to bring it accrues, or after the last acknowledgement of title [5].

The interest of the mortgagor.

As the great majority of mortgages are framed, the mortgagor has, by the terms of the transaction, but one right, viz.

[1] It cannot, of course, be enforced before the day fixed for payment of the mortgage money. Until that day is passed, the mortgagor is not in default.

[2] See post, p. 389.

[3] This is a special provision of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 25, repealing 15 & 16 Vict. (1852) c. 86. § 42. For the general practice on foreclosure see Seton, *Judgements* (5th ed.), vol. ii. c. xlvii, and Daniell, *Chancery Practice* (5th ed.), vol. i. p. 858.

[4] *Palmer* v. *Hendrie* (1859) 27 Beav. 349. Strictly speaking, a mortgagee who has foreclosed may offer the property back and sue on the covenant. But he thereby loses his foreclosure rights.

[5] Ordinarily speaking, the right to bring the action arises on the non-payment of the money on the day fixed. But payment of interest will keep alive the right. And if the mortgaged property is a reversion, the mortgagee will have twelve years after the reversion has fallen into possession (*Hugill* v. *Wilkinson* (1888) 38 Ch. D. 480). A mortgagee's action for *ejectment* runs from the date of the mortgage, because he was then entitled to take possession of the premises, unless there was a clause entitling the mortgagor to possession until default (*Doe* v. *Lightfoot* (1841) 8 M. & W. 553).

to reconveyance of the mortgaged premises, on payment of the mortgage money and interest on the day fixed by the covenant, usually six months from the date of the mortgage. But, as has been before explained, the mortgagor has long been a special object of solicitude on the part of judges and legislators, with the result, that he has acquired an interest to which is now attributed by the law all the incidents ordinarily attaching to equitable interests [1], of which, indeed, the interest of the mortgagor is one of the most conspicuous examples. Furthermore, the mortgagor has acquired certain other substantial rights, peculiar to his position. These may be enumerated briefly :—

Redemption.

(i) *To redeem*, at any time before actual foreclosure or sale, notwithstanding that the day fixed for payment has gone by. This right was one of the first secured to the mortgagor by the Court of Chancery, which looked with stern suspicion upon any attempt even to modify its exercise [2]. The right can be exercised, not only by the mortgagor and his representatives, but by any person interested in the equity of redemption in the mortgaged premises—e. g. a subsequent mortgagee, a judgement creditor, a devisee, a tenant by the Curtesy ; but such a person is only entitled to a reconveyance in accordance with the terms of his interest, reserving to others their rights [3]. The right to redeem can be enforced, if necessary, by an action for redemption, which is the counterpart of the action for foreclosure, and which is specially assigned, by the Judicature Act, 1873 [4], to the Chancery Division. The plaintiff in such an action offers to pay what may be found due to the mortgagee for principal, interest, and costs ; and prays that, upon payment of such sum, the mortgagee may be ordered to reconvey, or, according to a modern statutory provision, to transfer his mortgage [5], to the party paying the

Reconveyance.

Transfer.

[1] As to these, see ante, cap. viii. [2] *Howard* v. *Harris* (1683) 1 Vern. 190.

[3] *Pearce* v. *Morris* (1869) L. R. 5 Ch. App. 227.

[4] 36 & 37 Vict. c. 66. § 34 (3).

[5] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 15 (1). This special claim to transfer cannot be enforced if the mortgagee has been or is

money, or his nominee. The danger of bringing an action to redeem is, that, if it be dismissed for any cause except want of prosecution, the dismissal operates as a foreclosure, *ipso facto*, against the party bringing it; and his equity to redeem will, therefore, be thereupon barred[1]. The action to redeem, like the action to foreclose, is an action to recover land, and cannot, therefore, even if there be disabilities, be brought more than twelve years after the mortgagor has lost possession, or after the last acknowledgement of title[2]. A mortgagor who has let the day for payment go by, must give six months' notice of his intention to redeem[3]. Instead of a redemption, a mortgagor may now demand a sale; but it would appear, in spite of the opening words of the section, that the granting of such an order is in the discretion of the Court, which can order the mortgagor to give security for costs, and entrust the conduct of the sale to the mortgagee[4].

Sale.

Leasing.

(ii) *To grant leases.* It is one of the most startling novelties of the Conveyancing Act, 1881, to enable a mortgagor *in possession* to grant leases of the mortgaged property, on the same terms and to the same extent as a mortgagee in possession[5]. And these leases will bind, not only the mortgagor himself and his representatives, but also the mortgagee and all other incumbrancers[6]. They resemble in this respect the leases made by a tenant for life under the Settled Land Act, 1882[7]; but they differ from those leases in the important fact, that they can only be made

in possession. See also Conveyancing Act, 1882 (45 & 46 Vict. c. 39), § 12.

[1] *Marshall* v. *Shrewsbury* (1875) L. R. 10 Ch. App. 250.

[2] 37 & 38 Vict. (1874) c. 57. § 7. *Forster* v. *Patterson* (1881) 17 Ch. D. 133.

[3] *Smith* v. *Smith*, 1891, 3 Ch. 550.

[4] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 25.

[5] ib. § 18. As to the position of mortgagors' leases before the Act, see *Corbett* v. *Plowden* (1884) 25 Ch. D. 678.

[6] Thus, where a mortgagor had granted building leases of part of the mortgaged land, and the mortgagees afterwards sold another part, the purchasers of the latter were restrained from interfering with the rights of the lessees of the former. (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522.)

[7] 45 & 46 Vict. c. 38. § 6.

by a mortgagor *in possession*. The importance of the latter fact leads naturally to a few words, on the subject of the position of the mortgagor who retains possession of the mortgaged premises.

Mortgagor in possession.

It is sometimes said that a mortgagor in possession is a tenant at will to the mortgagee. This, it is submitted, is a misnomer. If the mortgage provides that the mortgagor shall be allowed to remain in possession until default, *à fortiori*, if there is no such provision, and the mortgagor occupies by mere tolerance of the mortgagee, there is no tenure between the parties, and no claims can be made by virtue of the relation of landlord and tenant. The position of the mortgagor is simply that of the feoffor to uses under the old system before the Statute of Uses, or of the *cestui que trust* who is let into possession under the new. But, of course, the parties may, if they please, create the relation of landlord and tenant between them, either by attornment or other appropriate means; and then the mortgagee will have the right of distress, and other remedies of a landlord, against the mortgagor. It seems, however, that even such an arrangement, at least if created by attornment, is purely personal to the parties, and does not pass to their representatives, even though the latter continue to occupy [1].

Restrictions on mortgagor's power of leasing.

A noteworthy peculiarity of the mortgagor's statutory power of leasing is that, unlike most of the other mortgagor's powers, it may be abrogated or varied by agreement of the parties [2]. As a matter of fact, its existence substantially damages the security of the mortgagee. It only applies to mortgages effected after December 31, 1881 [3].

Inspection of title-deeds.

(iii) *To inspect and take copies of title-deeds.* A useful provision of the Conveyancing Act, 1881, authorizes a mortgagor to inspect the title-deeds of the property (which are, of course, usually handed to the mortgagee on the execution of

[1] *Scobie* v. *Collins*, 1895, 1 Q. B. 375.
[2] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 18 (13) (14).
[3] ib. § 18 (16).

the mortgage), and to make copies or abstracts of and extracts from them[1]. In the absence of such a provision, the mortgagor might find it practically impossible to deal with property which, in the view of Equity, is still his own. The mortgagee's costs of production must be paid by the mortgagor. This right of the mortgagor is only implied in mortgages executed after December 31, 1881. It is inalienable[2].

This concludes the list of the statutory powers of a mortgagor, which, it must again be remembered, are in addition to the powers which he may exercise by virtue of the ordinary rules affecting equitable interests. This 'equity of redemption' is, in fact, an equitable interest of the most important kind. It may be sold, devised, incumbered, settled, or divided, as the mortgagor thinks fit. It will be subject to claims of dower and Curtesy. In many respects, especially in matters of public law, it is the equivalent of a legal estate. To realize its importance, the student should turn again to the chapter on equitable interests[3].

Equitable mortgages.

It is necessary now to advert to the subject of equitable mortgages, which, by reason of the greater ease with which they can be effected, are becoming increasingly popular for commercial transactions.

An equitable mortgage is a mortgage by virtue of which the mortgagee only acquires an equitable interest. This result may arise from one of two causes—(*a*) the fact that the mortgagor, though conveying by a formal instrument, has not got a legal interest, and therefore cannot convey one; (*b*) the fact that the mortgagor, though having a legal interest, employs a method inappropriate to convey it.

Formal equitable mortgages.

(*a*) *Formal mortgages of equitable interests.* These need not detain us long. If they are by deed, they will confer upon the mortgagee precisely similar powers to those conferred by a legal mortgage, limited only by the inability of the mortgagor to transfer rights which do not belong to him.

[1] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 16 (1).
[2] ib. § 16 (2).
[3] Ante, cap. viii.

Thus, the mortgagee will have all the powers of sale, insurance, and appointment of receiver belonging to a legal mortgagee; and, if he can lawfully obtain possession, the power of cutting timber and of granting leases, to the extent to which the mortgagor might have done. The statutory rights of an equitable tenant for life under the Settled Land Act, 1882, do not pass to his mortgagee[1]; but such a person can be restrained from exercising his statutory powers to the detriment of his mortgagee[2].

(*b*) *Informal mortgages.* No interest in land, legal or equitable, can be created by mere word of mouth, except the small interests specially allowed by the 1st section of the Statute of Frauds[3]. But informal mortgages, incapable of creating legal interests, have long been recognized by courts of Equity, and are now entitled to full protection. The shapes usually assumed by such informal mortgages are— Informal equitable mortgages.

(i) *Deposit of title-deeds* by the mortgagor with the mortgagee, which, even without any writing, will be deemed evidence of an intention to mortgage; and Deposit of deeds.

(ii) *Memorandum or agreement of charge*—i. e. an informal document, not, usually, under seal[4], which states briefly the intention of the parties to create a mortgage, but does not effectually transfer any legal interest.

These two informal methods may be used in combination or separately.

Briefly speaking, the rights of a mortgagee under an informal mortgage of this kind are as follows:— Rights of equitable mortgagee.

(i) *To foreclose.* It was laid down, in a recent case[5], that the relationship of mortgagee and mortgagor, by mere Foreclosure.

[1] 45 & 46 Vict. c. 38. §§ 2 (7), 50 (1). [2] ib. § 50 (3).

[3] *Re Beetham* (1887) 18 Q. B. D. 766.

[4] If the agreement is under seal, the mortgagee will have the statutory powers conferred by the Conveyancing Act, 1881; for by the defining section of that Act (44 & 45 Vict. c. 41. § 2 (vi)) a 'mortgage includes any charge on any property for securing money or money's worth.' But such a mortgagee will not be able to convey the legal estate, even if it belongs to the mortgagor (*Hodson's and Howes' Contract* (1887) 35 Ch. D. 668).

[5] *Lees* v. *Fisher* (1882) 22 Ch. D. 283.

deposit of title-deeds, entitled the former to a foreclosure decree in the usual way, except that the mortgagor will be directed to execute a conveyance to the mortgagee. Apparently, the rule is the same if the equitable mortgage be by memorandum or agreement only.

Sale.

(ii) *To an order for sale.* Formerly, an equitable mortgagee, by deposit only, was not entitled to an order for sale of the premises[1]. The rule has now been altered by the Conveyancing Act, 1881, which empowers the Court, on the request of the mortgagee, or of any person interested in the mortgage money, to order a sale[2]. And this power has been held to cover the case of a mortgagee by mere deposit[3].

Execution of formal mortgage.

(iii) *To execution of a formal mortgage.* This right, however, only exists, where there is a written agreement to that effect. But, when such an agreement exists, it is no objection to its enforcement, that it provides for the execution of a mortgage with an 'immediate power of sale[4].'

The net result of the statutes and decisions appears to be, that an equitable mortgagee without deed has no other powers and no covenant rights.

It must be carefully remembered, that an equitable mortgage may result in leaving the legal estate in the *mortgagor*. In such an event, the latter would retain all the powers of a legal owner, so far as third parties were concerned, subject to the general rule, that all persons taking with notice, express or implied, of the equitable mortgage, would be bound by it. The mere absence of title-deeds does not necessarily affect a purchaser with notice that they have been deposited by way of equitable mortgage; but it is sufficient to put him upon inquiry[5]. One of the peculiar privileges of a mortgagor by mere deposit of title-deeds is, that he is not compelled to give the usual six months' notice of his intention to redeem[6]. But

[1] *James* v. *James* (1873) L. R. 16 Eq. 153.
[2] 44 & 45 Vict. c. 41. § 25.
[3] *Oldham* v. *Stringer* (1885) 51 L. T. (N. S.) 895.
Hermann v. *Hodges* (1873) L. R. 16 Eq. 18.
Lloyd's Banking Co. v. *Jones* (1885) 29 Ch. D. 221.
Fitzgerald's Trustee v. *Mellersh*, 1892, 1 Ch. 385.

a person who has mortgaged an equitable interest by formal deed has no such privilege[1].

Before concluding the subject of mortgages, it is necessary to deal briefly with two important equitable doctrines indissolubly connected with them. These are known technically as Tacking and Consolidation.

Tacking is the doctrine by which a legal mortgagee is allowed to add to his legal security any equitable charges which he may have upon the same subject-matter, in priority to the equitable claims of other persons who have no legal interest. It is purely a privilege of the legal mortgagee; it can, therefore, never be claimed, except by a person who has the legal interest, or, at least, the best right to call for it. Where the equitable charges of the legal mortgagee would, naturally, take precedence of those of other incumbrancers (e. g. because they are prior in date) the doctrine has also no application; for, as between mortgagee and mortgagor, it requires no special rule of Equity to enable the mortgagee to pay himself out of funds in his own hands. It is where the equitable claims of other incumbrancers would naturally be prior to those of the legal mortgagee, that the doctrine is important. The simplest imaginable case is as follows. *A* lends £1,000 to *B* on security of a legal mortgage. *B* borrows £500 from *C* on the security of the equity of redemption. Subsequently, suppressing the fact of the loan by *C*, *B* borrows £600 more from *A*, on the security of the same equity of redemption. The property is worth £1,800. If *B* is insolvent (as he probably is), it is clear that some one must suffer. *A*, as clearly, gets his £1,000, which was not only legally secured, but first in time. But who comes next? *C*'s equitable charge is prior in time to *A*'s, and so, *primâ facie* to be preferred. But *A* has the advantage of being legal mortgagee, and therefore, both *A* and *C* being equally innocent of fraud, the doctrine of Tacking entitles *A* to pay himself, not only his £1,000, but his £600, before *C* gets anything. Either *A* sells under his power of sale, and

Tacking.

[1] *Smith* v. *Smith*, 1891, 3 Ch. 550.

keeps so much of the purchase money as is necessary to satisfy both his claims; or, if *C* wishes to redeem, as he may lawfully do[1], he must satisfy *A* both for the £1,000 and the £600. The same rule holds good, if the original parties are dead, between their representatives; and, to a certain extent, between their assignees[2]. But it will simplify matters, if we state the leading points on the doctrine of Tacking in the form of concise rules.

Legal estate.

(i) *The person claiming to tack must have the legal interest, or the best right to call for it.*

About the first part of this rule little need be said. A brief study of the leading cases on Tacking shows, that the whole strength of the doctrine turns on the holding of the legal interest. It is an example, somewhat exaggerated, perhaps, of the respect paid by the old courts of Equity to the legal title. A common lawyer might speak of it as the tribute paid by vice to virtue; an Equity jurist might describe it as an unworthy deference to ancient prejudices. In any case, the general principle has been clear since the earliest days of the doctrine. As the Court said, speaking of the claimant in *Marsh* v. *Lee*[3]: 'first he had law.' And in the great case of *Brace* v. *the Duchess of Marlborough*[4], the Court refused, on the other hand, to support the claimant, because it turned out that the prior mortgage which he had got in was not a legal mortgage at all, the legal estate being outstanding in trustees.

Right to call for the legal estate.

The second part of the rule is a little more difficult. As a general principle, the persons in whom a legal estate is vested are bound to hold it for the benefit of the persons equitably interested, according to their natural priorities, without favour or preference[5]. But if a late incumbrancer, by his superior diligence, obtains from the owners of the legal

[1] Ante, p. 389.
[2] *Taylor* v. *Russell*, 1891, 1 Ch. 8.
[3] (1670) 2 Ventr. at p. 338.
[4] (1728) 2 P. Wms. at p. 495.
[5] *Ex parte Knott* (1806) 11 Ves. Jr. at p. 618.

estate, without infringing the equity of his rival[1], a prior claim upon the legal estate, he will be entitled to use that claim, to protect himself against prior incumbrancers, of whose charges he had no notice when he lent his money. The doctrine is still very unsettled; and it would seem, that the only safe plan for a claimant in these circumstances (if he does not actually acquire the legal estate) is to take an absolute declaration of trust by the legal owners in his favour[2]. If that declaration of trust favours him unduly at the expense of his rival, it will probably be treated as invalid in a court of Equity; but if the question of undue preference is merely between himself and a stranger, the intermediate mortgagee will have no right to complain[3].

Money lent before knowledge of mesne incumbrance.

(ii) *All the charges sought to be enforced by the claimant, must have been created before the claimant was aware of the existence of rival incumbrances.*

It is immaterial that the claimant has not always been legal mortgagee; for one of the earliest settled points upon the doctrine of Tacking was, that a third mortgagee, who lent his money without notice of the second mortgage, might, by buying in the first and legal mortgage, 'squeeze out' the intermediate incumbrancer, and tack his original (third) mortgage to his subsequently acquired legal interest[4]. Nor is it material, in such case, that the claimant should have been aware, when he acquired the legal interest, of the existence of the second mortgage[5], for his purchase of the first mortgage does not *create* any new charge on the estate. This is, in fact, the famous doctrine of *tabula in naufragio*, said to

Tabula in naufragio.

[1] *Harpham* v. *Shacklock* (1881) 19 Ch. D. 207.

[2] *Wilmot* v. *Pyke* (1845) 5 Hare, at p. 22. See also *London & County Bank* v. *Goddard*, 1897, 1 Ch. 642.

[3] *Taylor* v. *Russell*, 1891, 1 Ch. 8.

[4] *Marsh* v. *Lee* (1670) 2 Ventr. 337. And the acquisition of the legal interest may take place at any time before a decree for account or foreclosure at the suit of a rival (*Bates* v. *Johnson* (1859) John. 304. See especially at p. 315).

[5] The third incumbrancer is technically styled 'the puisne' and the second 'the mesne,' in the old cases. But there seems to be no great advantage in using these terms.

owe its origin to Sir Matthew Hale[1]. But it *is* material that the claimant should not have *created* any fresh incumbrance, after notice of the intermediate charge[2]. Until recently, there was some doubt whether a first mortgagee, who had bound himself to make further advances, was entitled to do so to the detriment of a second mortgagee, of whose claims he had notice before making the further advances. But this doubt must now be considered as exploded by the decision of the Court of Appeal in *West* v. *Williams*[3], which overruled the judgement of the court below. The practical result of this rule is, that every second or subsequent incumbrancer should *immediately* give notice of the creation of his incumbrance to the legal mortgagee. But it does not appear that there is any absolute duty on the intending mortgagee of an equity of redemption to inquire if the first mortgagee has received notice of intermediate incumbrancers[4]; nor on the first mortgagee to answer such an inquiry. The notice of the intermediate incumbrancer is, therefore, complete protection only against the further advances of the first mortgagee; and the fact is an illustration of the extreme risk of lending money upon an equitable mortgage.

Claimant must be an incumbrancer, not a mere creditor.

(iii) *The original loan of the claimant must have been secured by direct charge on the mortgaged property; but a legal mortgagee may tack a subsequent indirect claim.*

As we have previously seen[5], there are many kinds of liabilities, such as those on bonds, judgements, &c., which can, by proper precautions, be made to operate as charges upon the lands of a debtor, either in his lifetime or after his decease. But they differ from the ordinary mortgage in this important fact, that they are not incurred directly on the

[1] *Brace* v. *Duchess of Marlborough* (1728) 2 P. Wms. 491.

[2] *Hopkinson* v. *Rolt* (1861) 9 H. L. C. 514.

[3] 1898, 1 Ch. 488; 1899, 1 Ch. 132.

[4] But he would very probably be held affected by constructive notice if he did not. (*Tildesley* v. *Lodge* (1857) 3 Sma. & Giff. 543.)

[5] Ante, cap. xv.

security of the land. Accordingly, it has long been held that such liabilities, though in a sense 'legal,' will not serve as a foundation for a claim to tack. Thus if *A*, who has a registered judgement against *B*, afterwards advance money to *B* on equitable mortgage of the land potentially affected by the judgement, he cannot, by enforcing his judgement, 'squeeze out' a prior equitable mortgagee, even though he had no notice of the latter's existence when he lent his money [1]. But a legal mortgagee, who subsequently, without notice of intermediate incumbrancers, lends more money to his mortgagor on a bond or judgement, may tack the latter against the intermediate incumbrancers [2].

Repeal and restoration of the doctrine.

Finally, it only remains to be said that, after having been abolished by the Vendor and Purchaser Act, 1874 [3], the doctrine of Tacking was revived, as from its repeal, by the Land Transfer Act, 1875 [4]. It would seem, therefore, that it can be successfully used against all intermediate incumbrances, except those created between August 6, 1874, and January 1, 1876 [5].

Consolidation.

Consolidation is the doctrine by which an incumbrancer, who has two or more incumbrances (legal or equitable) upon the

[1] *Brace* v. *Duchess of Marlborough* (1728) 2 P. Wms. at p. 491. (This was the point at issue in the case.) It seems, that if the claimant's earliest mortgage was really a direct charge on the land, or even a conveyance on trust for sale, the mere fact that it was given to secure money previously owing, is no objection to the assertion of the right to tack. (*Spencer* v. *Pearson* (1857) 24 Beav. 266.)

[2] *Shepherd* v. *Titley* (1742) 2 Atk. 348. It would seem that, *as against the representatives and devisees of the mortgagor*, the mortgagee may also tack specialty debts which can be directly enforced against the mortgaged land (*Coleman* v. *Winch* (1721) 1 P. Wms. 775). But this is merely to avoid circuity of action.

[3] 37 & 38 Vict. c. 78. § 7.

[4] 38 & 39 Vict. c. 87. § 129.

[5] The saving words in the Land Transfer Act are 'except as to anything duly done thereunder' (i. e. under section 7 of the Vendor and Purchaser Act) 'before the commencement of this Act.' Perhaps, however, these words are hardly wide enough to cover the construction suggested in the text. In the case of *Cummins* v. *Fletcher* (1880) 14 Ch. D. 699, it unfortunately happened to be the mortgage of 1871, and not the mortgage of 1874, which was in dispute.

property of a single mortgagor, may refuse, after the legal day for payment has arrived, to allow the mortgagor to redeem one incumbrance without redeeming the others. Again to take a simple illustration. *A* mortgages Whiteacre to *B* to secure £1,000; he also mortgages Blackacre to *B* to secure £1,000. Whiteacre is worth £1,600; Blackacre is only worth £800. If *A* is allowed to redeem Whiteacre by paying £1,000, *B* may lose £200 in realizing on Blackacre. But, if *B* is allowed to 'consolidate' his securities, and to take his total claim (£2,000) out of the total produce (£2,400), he will be paid in full. It may be said, that it was *B*'s fault to lend more on Blackacre than it was worth. But the law does not take that view; and if *A* lets the strict day for the payment of the Whiteacre mortgage go by, he cannot afterwards redeem Whiteacre without redeeming Blackacre also. At least, this was the case before the Conveyancing Act, 1881 [1], the effect of which we shall have hereafter to notice.

Rules of Consolidation.

The doctrine of Consolidation has given rise to many obscure questions; but the following rules may be said to be settled:—

No application till default.

(i) *The doctrine has no application till default has been made in the mortgage sought to be redeemed.*

This is evident from the explanation of the rule invariably given by courts of Equity. It is said, that it is inequitable to allow a mortgagor who is exercising a purely equitable privilege to do so without himself doing Equity. But the mortgagor who comes with his money to redeem Whiteacre, on the day fixed for payment in the mortgage, is exercising a strictly legal right. He does not need the protection of Equity; and Equity, therefore, can impose no terms on him [2].

Applies to equitable interests.

(ii) *The fact that the person seeking to consolidate has only equitable interests, is immaterial.*

This rule has never been seriously disputed; and it has

[1] 44 & 45 Vict. c. 41. § 17.

[2] *Cummins* v. *Fletcher* (1880) 14 Ch. D. at p. 709.

been recognized by the highest authority in a very recent case [1]

(iii) *The doctrine applies equally between purchasers from the original parties as between the parties themselves.* Extends to purchasers.

This is the point at which the application of the doctrine becomes both difficult, and of doubtful justice. *A* mortgages Whiteacre to *B*, and Blackacre to *C*, by distinct mortgages. Blackacre is insufficient to cover *C*'s mortgage money. *C* takes a transfer of *B*'s mortgage on Whiteacre. *C* is now mortgagee of both properties. Can he consolidate? Again, suppose *A* to mortgage Whiteacre to *B*, and *Z* to mortgage Blackacre to *B*. *A* buys *Z*'s equity of redemption, whereby both properties become vested in *A*, subject to the mortgages to *B*. Can *B* consolidate as against *A*? Once more, reversing the process, supposing *A* to have mortgaged Whiteacre and Blackacre to *B* by separate mortgages; and then to have sold the equity of redemption in Whiteacre to *Z*, who has no notice of the mortgage on Blackacre. Is *Z* to be forbidden to redeem Whiteacre unless he is willing also to redeem Blackacre?

It may be laid down as the rule, that a mortgagee can always (subject to the Act of 1881) refuse to receive his mortgage money due upon any one mortgage, when he holds another mortgage, the equity of redemption in which has, at any time while the two mortgages have been held by him, been united in the then owner of the equity of redemption in the mortgage sought to be redeemed [2]. And therefore all three cases just put will fall within the doctrine. The only substantial exception to the rule is, that a mortgagee cannot consolidate, as against the assignee of an equity of redemption, a mortgage which was not effected until after the assignment of the equity of redemption was made [3]. Thus,

[1] *Pledge* v. *White*, 1896, A. C. at p. 192.

[2] *Tweedale* v. *Tweedale* (1857) 23 Beav. 341; *Vint* v. *Padget* (1858) 1 Giff. 446.

[3] *Jennings* v. *Jordan* (1881) L. R. 6 App. Ca. 698, overruling earlier decisions. *Baker* v. *Gray* (1875) 1 Ch. D. 491.

if *A* mortgage Blackacre to *B*, and then sell the equity to *C*, and subsequently mortgage Whiteacre to *B*, *B* will not be able to consolidate the mortgages, because *C*'s title to the equity of Blackacre arose before the mortgage on Whiteacre was effected.

Modification of the doctrine.

(iv) *The doctrine does not apply to mortgages created after December* 31, 1881, *unless the contrary is expressed in the mortgage.*

This is the effect of the Conveyancing Act, 1881[1]; but the wording of the section is not very clear. By using the expression 'mortgage deeds or one of them,' it raises a doubt whether it is the date and wording of the mortgage sought to be redeemed, or those of the mortgages which it is attempted to consolidate, which are the important factors. Suppose a mortgagor seeking to redeem a mortgage dated in 1875, and being met by a claim to consolidate a mortgage dated in 1883. Would the claim be good? Probably not; but it will be observed that, in such a case, the protection is really given to a mortgage executed prior to the Act. And again, if the mortgage of 1883 contained a clause in favour of consolidation, why should that clause affect a mortgage dated before the Act?

Finally, it may be pointed out that, although the doctrine of Consolidation (where it is permitted) is in terms a defensive one, it can be actively enforced by an action of foreclosure, which prays that none of the equities may be redeemed until all the plaintiff's mortgages are paid off. This was the form of the successful bill in *Beevor* v. *Luck*[2]; and, though that case has been overruled on its most important point, the form of the proceeding has not been questioned. A mortgagor who exercises his power of sale in respect of one mortgage, can also, if the doctrine of Consolidation applies, retain the surplus arising from the sale, to make good any deficiency on the others[3].

[1] 44 & 45 Vict. c. 41. § 17.

[2] (1867) L. R. 4 Eq. 537.

[3] *Selby* v. *Pomfret* (1861) 1 Johns & H. 336.

CHAPTER XXV.

SETTLEMENT.

A SETTLEMENT is defined by the Settled Land Act, 1882, as any instrument or instruments whereby 'any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession[1].' For the purposes of this chapter, a settlement means an instrument or instruments of the character contemplated by the Settled Land Act, but made with the object of providing for the members of a family[2].

Classification of settlements.

By Will and by deed.

Voluntary and for value.

Such settlements may be classified in various ways, according to origin, circumstances, object, scope, and method. We may, for example, distinguish between settlements by Will and settlements by instrument *inter vivos*; and for some purposes, especially purposes of construction, the difference will be important. Settlements, again, may be either 'voluntary,' i. e. without valuable Consideration, or settlements for value— e. g. in Consideration of a contemplated marriage. This

[1] 45 & 46 Vict. c. 38. § 2 (1). The Settled Land Act deals only with settlements affecting land, and the scope of this work has a similar limit. But much of the law relating to 'personal' settlements of land applies also to settlements of pure personalty.

[2] The Settled Land Act contemplates certain artificial or purely technical settlements not included in the general definition, e. g. (section 59) the holding of land by an infant. It is also, of course, perfectly possible that a settlor should make dispositions by way of succession in favour of strangers. But these unusual cases do not fall within the scope of a chapter on ordinary settlements.

distinction is, as we have seen[1], highly important for the purposes of the Bankruptcy Acts, and the statutes of fraudulent conveyances. But by far the most useful classification, for the purposes of a chapter on the conveyancing principles of settlements, is a classification according to method. By this classification, settlements fall into two groups, according as they are either 'real' or 'personal.'

Real or personal

Real settlements.

A *Real Settlement*, often called also a 'family' or 'strict' settlement, is a settlement which achieves its object of providing for the members of a family, by limiting to them successive legal interests in a definite area of land, which has usually been a possession of the family for many generations, or which it is hoped will become such. Even here, no doubt, provision has to be made for minor interests, by methods which may ultimately involve alienation of the land to a stranger. But it is always contemplated that such extreme measures shall only be adopted as a last resort; and any person who avails himself of them is apt to encounter severe criticism. Moreover, a 'real' settlement nearly always adopts the principles of the common law of descent, viz. preference of males to females, and, among males, preference of the eldest in the same degree, and his issue.

Personal settlements.

A *Personal Settlement*, on the other hand, or, as it is sometimes described, a 'settlement by way of trust for sale,' treats the subject matter of its provisions, not as an heirloom to be preserved in its existing condition at all hazards or inconveniences, but simply as an investment for the purpose of providing a certain amount of capital and income, for distribution among the members of a definitely limited group. It deliberately contemplates the probability that, in the course of years, the present condition of the subject matter, be it land or chattels, will be changed, as the convenience of the situation or the pecuniary advantage of the beneficiaries may demand. It does not contemplate, on the other hand, that the beneficiaries shall obtain legal interests in the subject matter,

[1] Ante, pp. 293-8.

at least until the final division; it arranges that the legal interest shall remain exclusively in the hands of trustees, and that the beneficiaries shall merely be entitled to call upon the latter to divide the beneficial produce among them. Finally, a 'Personal Settlement' usually (but not, of course, necessarily) provides for an equal distribution among the family of the settlor. The reason why such a settlement, though comprising interests in land, is called a 'Personal Settlement,' is to be found in the well-known equitable rule of Conversion[1], by which property (whatever its character), directed to be sold and converted into money, is stamped with the character of personalty from the date of the direction. Accordingly, every settlement which contains a general trust for sale is, in the view of Equity, not merely a 'personal settlement,' but a 'settlement of personalty.'

Plan of chapter.

With this preliminary explanation, we may proceed to deal with the two classes of settlement. First, we may treat briefly of the form assumed by each class, being careful to remember that, in every individual case, the precise form adopted is fixed (subject to the rules of law) by the arrangements of the parties, and can, therefore, within such limits, be varied as required. The forms outlined are merely typical. Afterwards, we may proceed to deal with questions which are common to settlements of both classes, such as the powers of trustees and persons having limited interests.

A. Real Settlements.

Form of a Real Settlement.

The object of such settlements being, as we have said, to limit successive legal interests in the land, there is, practically, but one way by which that object can be achieved. Any attempt to effect this object by common law limitations of seisin, would be almost certain to fail, owing to the highly technical rules of tenure, previously discussed. But, by means of the doctrine of *uses*, operated upon by the statute, the desired result can be obtained, care being taken at every step

[1] For an explanation of this rule and its important consequences, see Snell, *Principles of Equity* (12th ed.) cap. ix.

to observe the limits of the Rule against Perpetuities[1]. The whole of the common law seisin is conveyed by an ordinary assurance to persons who are usually styled 'trustees,' but who really are very little more than grantees to uses, and then, out of their seisin, successive estates are limited by way of use. These limitations, being within the terms of the Statute of Uses[2], create, of course, legal interests, which are not, however, subject to the old common law rules of tenure. There is, in fact, no tenure between the *cestui que use*, and the person out of whose seisin the use is limited.

After this explanation, we may proceed to set out the steps in a very simple case of Real Settlement, made in contemplation of future marriage.

Conveyance to trustees.

(i) *Conveyance of the property to the (general) trustees by the owner 'as settlor.'*

Covenants for title.

It has sometimes been made a question, whether a settlor should be called upon to use a form of conveyance which implies ordinary covenants for title[3]. On the one hand it is pointed out, with unquestionable truth, that the Conveyancing Act[4] contemplates a person who shall convey 'as settlor,' and makes him liable only on an implied covenant 'for further assurance.' On the other hand, it is retorted, that the sub-section referred to only contemplates the case of 'voluntary' settlements in the strict sense, i. e. settlements without valuable Consideration. Now an ordinary settlement made in contemplation of future marriage, is not, of course, a 'voluntary settlement'; and it is said, or used to be said, that a settlor, in such a case, ought to take the ordinary responsibilities of a vendor, by conveying 'as beneficial owner[5].' But is the argument sound? Either the settlor is himself

[1] Ante, pp. 116-7. The rule is, in fact, the most dangerous pitfall in the way of the unwary settlor. He naturally wishes to go as near the edge as possible, and is always in danger of slipping in.

[2] 27 Hen. VIII. (1535) c. 10.

[3] Hood & Challis, *Conveyancing and Settled Land Acts* (3rd ed.) p. 25.

[4] 44 & 45 Vict. (1881) c. 41. § 7 (E).

[5] It will be noticed that the terms of section 7 (A) fully justify the view

a volunteer, i.e. a person other than the intended husband or wife, in which case it would be hard to saddle him with legal responsibilities as a consequence of his bounty; or one of the intended spouses is the settlor, in which case it would hardly conduce to domestic felicity to subject him to a law-suit by the trustees[1]. The weight, therefore, both of opinion[2] and reason, seems to be in favour of allowing the person making the conveyance to convey 'as settlor' only.

(ii) *To the use of the settlor and his heirs until the celebration of the marriage, (remainder),* Uses till marriage.

This limitation, of course, only occurs where the settlement is made in contemplation of future marriage. Its effect would be, in the event of the marriage being broken off, to give the settlor a legal fee, subject to executory limitations over. If the cause of the breaking off of the marriage were the death of one of the parties, the settlor would be, practically and technically, in the same position as he was before making the settlement. But if the intended spouses remained alive, the settlor might have to get the settlement set aside by the Chancery Division, before he could make a marketable title[3].

(iii) *To the use that the (pin-money) trustees shall receive a rent charge of £ , and pay the same to the intended wife during the existence of the marriage*[4], *(remainder),* Pin-money clause.

This is the provision for the pocket-money of the lady. It would not, of course, occur where the first life estate was

that, if the term 'as beneficial owner' were used, the settlor's liabilities would be those of an ordinary vendor.

[1] It must be observed that, if the trustees had the power to bring an action, they might not be justified in declining to exercise it.

[2] Hood and Challis, *Conveyancing &c. Acts* (3rd ed.), p. 32; Wolstenholme and Turner, *Settled Land Acts* (3rd ed.), p. 38; Key and Elphinstone, *Precedents* (3rd ed.), ii. 443; *contra*, Vaizey, *Settlements*, i. 324.

For a recent case of this kind, see *Bond* v. *Walford* (1886) 32 Ch. D. 238.

[4] The usual form is, perhaps, during the joint lives of husband and wife. In such a case the Court has power, on a divorce, to vary settlements so as to do substantial justice. But it would seem to be safer to make the pin-money payable only during the marriage, leaving the wife to her claim for alimony on a divorce for the husband's fault.

given to her, e. g. where the property was settled by her or her father. In such a case, the husband might obtain a similar provision. But where, in the ordinary case, the wife has an independent income, or, in the case last put, the husband has means of his own, the provision might be omitted altogether. It was formerly necessary to limit a term of years to the pin-money trustees, to enable them, by sale or mortgage of it, to raise the annuity if payment were withheld by the tenant for life. But such a course is rendered unnecessary by the Conveyancing Act, 1881 [1], which gives ample powers of distress and sale to every rent-charger whose rent-charge is in arrear. It is, however, better to give the legal interest in the rent-charge to the trustees, instead of directly to the wife, as enforcement of proceedings against her husband's estate by a wife is not calculated to promote matrimonial harmony. The pin-money trustees are usually the same persons as the general trustees of the settlement; and, if things go smoothly, their duties in this special capacity are almost *nil*. The husband, as tenant for life, makes his wife a personal allowance to the extent of the pin-money, or husband and wife arrange their expenses as they please [2]. It is only in the event of strained relations, that the pin-money clause becomes really important; and the fact that this is so, is evidenced by the rule, laid down long ago by courts of Equity, to the effect that only a very limited arrears of pin-money can be recovered [3]. If a wife chooses to waive her claim, she cannot afterwards change her mind. But this rule does not apply against an assignee for value [4]. And, on the other hand, a wife living apart from her husband [5], even

[1] 44 & 45 Vict. c. 41. § 44.

[2] That this is the legal view, is shown by the judgement of Lord Cottenham in *Caton* v. *Rideout* (1849) 1 Mar. and G. at p. 603.

[3] *Townshend* v. *Windham* (1750) 2 Ves. Sr. 7. per Lord Hardwicke. The usual period is said to be one year; but there is some little doubt on the subject. See Vaizey, *Settlements*, i. pp. 788–92.

[4] *Tuffnell* v. *O'Donoghue*, 1897, 1 Ir. R. (Chy.) 360.

[5] *Moore* v. *Moore* (1737) 1 Atk. 272.

(it is said) if she has committed adultery, is able to enforce payment of her pin-money.

(iv) *To the use of the husband (or wife) for life, (remainder),* First life estate.

This limitation is extremely important, as it constitutes the person in whose favour it is made, the virtual administrator of the property, and vests in him the wide powers of management and disposition conferred by the Settled Land Acts upon a tenant for life. It is usually made in favour of the settlor; but, if the latter be the wife or a relation of hers, it is possible that the life estate, subject to a substantial pin-money charge, will be given to the husband. In the latter case, his estate should certainly not be made 'without impeachment of Waste.'

(v) *To the use that the wife, after the death of her husband,* Jointure clause. *shall receive during her life a rent-charge of £ , in lieu of jointure, dower, &c., (remainder),*

This, usually, but incorrectly, called the 'jointure clause,' is intended to provide a maintenance for the wife if she survive her husband. It is generally on a more liberal scale than the pin-money charge, which is intended only to furnish her pocket-money. In reliance on section 44 of the Conveyancing Act, 1881 [1], the term which was formerly limited to secure this charge may be safely omitted; and there is, of course, not much objection to giving the rent-charge directly to the wife, without the interposition of trustees [2]. The clause contains a proper declaration, that the charge is to bar all the widow's possible claims under the Dower Act [3]. If it is thought desirable, the jointure charge can be made to cease on the widow's remarriage; but the limitation to her separate use is now superfluous [4].

(vi) *To the use of the (portions) trustees for 500 years without impeachment of Waste, (remainder),* Portions clause.

[1] As to this, see ante, p. 163.

[2] It must be remembered, however, that, in all probability, a widow enforcing her jointure charge would have to do so against her own son or her husband's nephew.

[3] 3 & 4 Will. IV. (1833) c. 105. § 6. [4] 45 & 46 Vict. (1882) c. 75. § 2.

Under this clause is contemplated the provision for such of the issue of the marriage as will not take legal interests in the land, i.e. the younger sons and the daughters. At a later stage of the settlement, the trustees are directed to stand possessed of this term of years, upon trust to raise a total sum not exceeding a fixed amount, but varying within the prescribed limits according to the number of the claimants. The apportionment of the shares of the children in this fund is frequently left to the intended husband or wife, or both jointly, and may be made the basis of a future sub-settlement on the marriage of a child. It will be observed, that it is not sufficient merely to charge the land with the sum required for portions; for the remedies given by law to equitable mortgagees are not the most convenient for raising portions with as little disturbance as possible, and it is not desired to give the portions trustees power to foreclose the whole estate. The device is adopted of creating a term of years, which, being for a great length and at no rent, is practically as valuable as the inheritance, but which can be sold, mortgaged, or surrendered, without disturbing the socage title. Again, if all goes well, the first tenant in tail will probably pay the portions himself, either by sale of part of the property, or otherwise, and the term will never be made use of. Or, even if the trustees have to mortgage the term, the tenant in tail will keep down the interest and, eventually, pay off the mortgage, with the result that the term will, in Equity, become exhausted. In such circumstances, the term ought, it is submitted, being merely by way of use and not by way of tenure, to have been deemed legally extinct, even without surrender. But the old conveyancers chose to think otherwise, with the result that the existence of so-called 'outstanding terms' was at one time a cause of endless expense and risk. The machinery devised by the Legislature for getting rid of these terms will be explained later on [1].

[1] Post, pp. 439-42.

(vii) *To the use of the first and other sons of the marriage successively in tail,* (*remainder*), Remainders to sons in tail.

This is, it will be observed, the first limitation of an estate of inheritance by the settlement, and it is, no doubt, quite possible for the eldest son, succeeding by virtue of it, to put an end to further devolution, by barring his estate tail (with the consent of the tenant for life if still living), subject, of course, to the existing pin-money, jointure, and portions charges. This is, in effect, the plan usually adopted, when the son wishes to resettle the property on his own marriage. And no device of the settlor can prevent such a result; for, to give the son a life estate, followed by an estate tail to *his* son, would be flagrantly to violate one of the rules for the limitation of contingent remainders[1] as well as the Rule against Perpetuities. And an estate tail is, as we have seen[2], incapable of protection against barring by an owner who has attained twenty-one years of age. If, however, the eldest son does not bar the entail, and he dies without issue, or his issue fail at any time, then his younger brothers, in order of seniority, and their issue, will succeed him, not as his heirs, but as remaindermen under the settlement.

(viii) *To the use of the daughters of the marriage equally as tenants in common in tail, with cross remainders over,* (*remainder*), Remainders to daughters in tail.

Under this clause the daughters, if there are no sons or issue of sons, share equally; and the issue of such of them as may be dead represent their ancestress according to the usual rules of descent. For each daughter, as she is born, takes a vested interest in remainder, capable of descending to her issue. But, if the issue of one of the daughters should fail, her share could not, in the ordinary way, go to her sisters or their issue, they not being her heirs in tail. There would in such a case be a failure of the settlement as to her share. To prevent this contingency, the so-called 'cross remainders' clause is Cross remainders.

[1] Ante, pp. 99, 100.

[2] Ante, pp. 33-5.

introduced, which entitles such sisters or their issue to succeed in proportionate shares *by way of remainder*, until the whole estate is ultimately vested in a single sister or her issue[1]. Upon failure of this last limitation, the final clause of disposition takes effect, viz.:—

Ultimate reversion.

(ix) *To the use of the settlor and his heirs.*

It was never strictly necessary to express this clause, which merely stated the existence of the reversion implied by law upon failure of the limitations of the settlement. It had, however, formerly this advantage, that it enabled the Court, under its statutory powers[2], to authorize a sale of the whole fee simple when, but for its existence, the reversion in fee could only have been disposed of by barring the entail. But now, by the Settled Land Act, 1882[3], the ultimate reversion is to be deemed, for purposes of the Act, to have been comprised in the settlement, whether actually so comprised or not.

Re-settlement.

Hitherto we have assumed, that our Real Settlement is of the simplest possible type, in which a settlor entitled in fee simple disposes absolutely of his unincumbered property. As a matter of fact, few cases of Real Settlement are so simple. Very frequently, the settlor is himself only tenant in tail in remainder under a previous settlement; and, even if he procure the consent of the tenant for life, he can only dispose of the property subject to the existing claims under the old settlement, which may comprise life interests, pin-money charges, jointures, and portions for one or two generations.

It might be thought that, in the circumstances, it would hardly be worth the while of the tenant in tail to effect a

[1] It may, of course, be provided, that, if there are only daughters by the contemplated marriage, they shall be postponed in the inheritance to the sons (if any) of any subsequent marriage. And, in the case of a historical estate, especially if accompanying a title of honour, this would probably be done. An easy way to effect the provision would be to alter clause (vii), to cover the first and other sons successively of any marriage of the intended husband.

[2] e. g. Settled Estates Act, 1877 (40 & 41 Vict. c. 18) §§ 2, 16.

[3] 45 & 46 Vict. c. 38. § 2 (2).

settlement. But the tenant for life can, in fact, offer a substantial bribe to his son to continue the family tradition, by consenting, if the settlement is made, to charge an annuity for the latter on his own life interest, which will probably provide a larger income for the son, than any which he is likely to realize by a sale (as a base fee) of his estate tail in remainder. This is, in fact, the plan by which, combined with family pride, the policy of the Fines and Recoveries Act is defeated. Unless some tenant for life happens to die while his eldest son is under age, or some son rigidly maintains himself on his own resources till his father's death, the land never gets free of the settlement chain, except it be released by the sweeping sword of the Settled Land Act. We may indicate briefly the process by which land, already in settlement, is resettled on the marriage of the eldest son.

Disentailing assurance.

(i) *Disentailing assurance in fee, limiting the land to (general) trustees, to such uses as tenant in tail and protector shall jointly appoint.*

This deed must, of course, be executed with the formalities prescribed by the Fines and Recoveries Act, 1833 [1]. The tenant in tail will be the son, whose intended marriage has caused the re-settlement. The protector will be his father [2], the tenant for life in possession under the old settlement. By the disentailing assurance, the land is set free from all estates arising under the old settlement, subsequent to the tenancy in tail of the son; but it remains subject, of course, to the various charges which take precedence of that estate.

Appointment until marriage.

(ii) *Appointment (until the solemnization of the intended marriage) to the uses of the old settlement, (remainder),*

This is a precaution (probably unnecessary) which corresponds with the limitation in the former example to the settlor until the solemnization of the marriage. It is merely

[1] 3 & 4 Will. IV. (1833) c. 74. Ante, pp. 357-9.

[2] Of course it is possible, in a long-lived family, that the tenant for life in possession should be the *grandfather* of the intended husband. In such a case he, and not the father, will be protector. But the father must join, to convey his life estate.

intended to keep the interests of the parties *in statu quo*, until the happening of the event which is to cause the change.

New pin-money clause.

(iii) *To the use that the intended wife shall have a pin-money charge,* (*remainder*),

The form of this limitation has been previously explained [1]. The only difference here is, that the limitation takes effect by appointment instead of by conveyance. It is sometimes provided, that the protector should convey his life estate and the tenant in tail convey again, in case of irregularity in the disentailing assurance. But it is simpler for the protector to convey also by the disentailing assurance; and an ordinary conveyance by the tenant in tail would have no effect.

Annuity for the husband.

(iv) *To the use that the intended husband shall receive an annuity during the joint lives of himself and his father,* (*remainder*),

This is the bribe which makes it worth the son's while to execute the settlement. If grandfather and father are both living, the son's annuity may be made to increase on the death of either; as such an event would extinguish the annuity of the father.

New jointure clause.

(v) *To the use that the intended wife shall receive a jointure charge,* (*remainder*),

This clause has likewise previously been explained [2]. The wife's jointure might also be made to increase, in the event of the protector's death after that of the intended husband.

Maintenance for children.

(vi) *To the use that trustees shall receive a rent-charge to support the children of the intended marriage,* (*remainder*),

This clause has nothing to correspond with it in a simple settlement. It is necessitated by the possibility that the intended husband may die in the lifetime of his father, whereby his annuity will cease, and his children be without immediate claim on the property. It is carefully worded, only to take effect in this contingency.

New portions clause.

(vii) *To the use of* (*the same*) *trustees for a term of* 500 *years without impeachment of Waste,* (*remainder*),

[1] Ante, pp. 407-9. If there are previous pin-money charges, the pin-money of the intended wife may be made to increase as they drop off, and likewise with the death of the protector.

[2] Ante, p. 409.

This term is limited to the trustees, to enable them to raise portions [1] for the children of the intended marriage, other than the eldest son, who will, in the normal course, succeed to the bulk of the settled property under the subsequent limitations.

(viii) *To the use of the protector for life,* (*remainder*), Life estate of protector.

The existing tenant for life under the old settlement here takes his place again as tenant for life, subject to the incumbrances created by the new settlement [2].

(ix) *To the use of the intended husband for life,* (*remainder*), Life estate of husband.

This clause will bring the settlor into possession, precisely at the same date as under the old settlement; but, of course, as tenant for life, not as tenant in tail, and subject to the amount of his wife's pin-money charge.

(x) *To the use of the first and other sons of the intended marriage successively in tail* (*male*), (*remainder*), Remainder in tail to sons of marriage.

This clause again is really expletive of the old settlement, under which the eldest son of the intended husband would naturally have succeeded his father as heir in tail. But the substantial difference is, that, under this second settlement, this interest cannot be defeated by a bar of the entail by the father, the remainderman in tail under the old settlement. It is, of course, quite optional for the parties, to limit the interests of the sons of the intended marriage in tail general or in tail male; but in a strict settlement, of the kind which we are considering, the latter course would probably be adopted.

(xi) *To the use of the second and other sons successively of the protector in tail* (*male*), (*remainder*), Remainder to younger sons of protector.

Here we arrive at a substantial difference between a

[1] As to these, see ante, pp. 409–10.

[2] Before this clause it is not unusual to insert another, giving the protector and settlor power of appointing jointly as they please. Presumably this power is given, to enable the parties to make any alteration in the ultimate devolution of the property, which may be rendered desirable by change of circumstances. But the drawbacks attendant upon the clause are considerable, inasmuch as it virtually enables the protector and settlor to withdraw the property from settlement, and alienate it absolutely, subject only to existing incumbrances (*Minton v. Kirwood* (1868) L. R. 3 Ch. App. 614).

settlement by an owner in fee, and a re-settlement (such as we are describing) by a tenant in tail in remainder, with the consent of the tenant for life (protector). The desire of the latter to keep the property in the strict line of descent, induces him to postpone the claims of his younger sons, to those of the male issue of the intended marriage. But this consideration does not apply to the female issue, except to the extent of providing them with portions. The property then reverts to the old line of settlement, in favour of the sons of the protector.

Extra portions for daughters.

(xii) *To the use of (separate) trustees for* 1,000 *years to raise a sum of* £ , *(remainder),*

This clause is only inserted in settlements of the 'strictest' type, in which the desire of the parties to keep the property in the male line is superior to all other considerations. In such cases, on failure of male issue of both intended husband and protector, the property is made to go to the other male issue of the protector's father, though they are, of course, only collateral to both protector and intended husband. But, as a concession to natural affection, the present provision authorizes the raising of a substantial sum of money, to be divided equally between the daughters of the protector and those of the intended husband, in such shares, as to each moiety, as the protector and intended husband shall respectively appoint [1]. This provision, while it secures to the nearer female relations substantial pecuniary advantages from the failure of the immediate male line, does not interfere with the strict descent of the inheritance; and, as the old settlement was, itself, probably the result of the barring of an entail created by a still remoter settlement, under which the protector's brothers took contingent interests, there is a certain poetic justice in attempting to repair the broken threads. This object is achieved by the following clause :—

[1] It is possible, in providing for the division of these portions, to stipulate that the issue of deceased daughters shall represent their parents. But great care must be taken in such an event, to avoid infringing the Rule against Perpetuities.

(xiii) *To the use of the brothers of the protector successively in tail male.* Remainders in tail to brothers of protector.

Here the limitations usually end; though we may, if we please, go on to limit remainders in tail female to the persons who have taken remainders in tail male, or remainders in tail general to the daughters of the intended husband and the protector respectively, in each case each degree taking as tenants in common 'with cross remainders over'[1]. And then there may be the final limitation to the intended husband (the settlor) in fee[2].

B. Personal Settlements. Personal settlement.

In this case, as has been said, the object of the parties is simply to make provision for the issue of the contemplated marriage, without regard to the preservation of the identity of the settled property. The property to be settled may be provided by the intended husband or by the intended wife, or by relatives of either; and the disposition of the beneficial interest will probably be substantially affected by these circumstances. But this again is entirely a matter of arrangement between the parties. The limitations of a very simple settlement of this kind will be as follows:—

(i) *Conveyance of the property, in appropriate form, to the trustees to the use of, or in trust for, the respective settlors until the marriage*[3], *and afterwards on trust for sale.* Conveyance to trustees.

If the settled property comprises any land, it is far better that the conveyance to the trustees should take the form of a simple deed of assurance, separate from the settlement

[1] Ante, pp. 411-2.

[2] Ante, p. 412. It need hardly be pointed out that the student will infinitely lessen his task of comprehending the limitations of a strict settlement, if he reads the above description side by side with an actual precedent or form, e. g. that given as No. iv. in Vaizey on *Settlements*, vol. iii. or Key & Elphinstone, *Precedents* (3rd ed.) vol. ii. p. 668.

[3] It will be observed that, if the property conveyed is leasehold or copyhold, the settlors will, under this clause, only obtain equitable interests. But the trustees under it will only be 'bare trustees,' and the settlors will be entitled, if the marriage goes off, to reconveyances of the legal estate.

which contains the subsequent disposition of the proceeds of sale. For, although, by the trust for sale, the trustees will have power to give to purchasers receipts which will exonerate them from making inquiry as to the application of the purchase money [1], yet it is much more convenient to separate the details of the settlement from the title to the land. The trustees may find it convenient to be able to hand over the conveyance to a purchaser, or to acknowledge a liability for its production, which it might be very awkward to attach to the settlement itself. In the case of land, it is very important to make the conveyance on trust for sale, not merely with power of sale, as the former course stamps the property at once with the character of personalty [2]. It is, of course, always possible to authorize the trustees to delay the execution of the trust in the exercise of their discretion, or even to make it dependent on the direction of the husband or wife, or both, during their respective lifetimes. The execution of the conveyance to the trustees will be accompanied by the execution of a contemporaneous deed (known usually as 'the settlement'), which will be principally occupied with declaring the purposes to which the proceeds of the sale (and the property itself until sale) are to be put. These will usually be :—

Trust for investment.

(ii) *To invest in specified securities, or in securities sanctioned by law.*

The list of securities authorized by law for investment by trustees will be found in the Trustee Act, 1893 [3], and, as it is fairly comprehensive, it may well be doubted whether, except in special circumstances, it is prudent to go outside it, except, possibly, for the purpose of sanctioning investments in leaseholds [4]. On the other hand, it may be considered ad-

[1] Trustee Act, 1893 (56 & 57 Vict. c. 53) § 20.

[2] *Pitman* v. *Pitman*, 1892, 1 Ch. 279. It should be noticed, that even the *exercise* of a power of sale will not necessarily give the proceeds the character of personalty.

[3] 56 & 57 Vict. c. 53. § 1. See post, p. 432.

[4] The Act authorizes 'real' securities (§ 1 (b)); but real securities do

visable expressly to forbid investment in any particular class of investment authorized by the Act; and such prohibition will be effectual.

(iii) *To stand possessed of the proceeds, in trust to pay the income to the husband and wife during their joint lives, in proportion to the property brought in by each.* Life interests during marriage.

Here again it may be arranged, that the whole income should be paid to the husband, as head of the matrimonial establishment. But the tendency is, and will increase, to give each party the income of his or her former property only. The share of the wife may, of course, be made payable 'without power of anticipation,' but, in any case, it will belong to her for her separate use. Upon the death of either husband or wife a very common trust will be—

(iv) *To pay the income of the whole fund to the survivor during his or her life.* Of survivor.

But here, again, if the fund is very large, it may be considered desirable to accumulate the whole or a portion of the deceased's income, for the benefit of the children of the marriage, or even to expend it on their maintenance and education during the lifetime of their surviving parent. Perhaps the best method of all is, to enable each party (husband and wife) to bequeath by Will to the survivor a life interest in the property contributed by him or her. Upon the death of the survivor, the trustees will then be directed to stand possessed of the investments—

(v) *Upon trust for the issue of the intended marriage, in such shares as the intended husband and wife shall jointly appoint, or, in default, as the survivor shall solely appoint.* Trusts of capital.

Here again, if desired, the Power of each party to appoint may be strictly limited to the proceeds of the property contributed by him or her; but this course ought not to

not include leaseholds in the ordinary sense (*Re Chennell* (1878) 8 Ch. D. at p. 508), though they do include mortgages of 'property' (? other than land) held for at least 200 years at a rent not greater than a shilling a year (§ 5 (1) (a)). On the other hand, if a power to invest in leaseholds be given, it should be carefully restricted.

be taken without special authority. The Power of appointment may be made exerciseable by deed or Will; but it must actually be so exercised, that all the issue taking under it acquire indefeasible interests within twenty-one years of the death of the survivor of husband and wife[1]. Under this Power, it will be easy for the parties to provide for a sub-settlement on the marriage of a child, by executing an irrevocable deed of appointment in its favour[2]. The rules for the creation and execution of Powers of appointment have been previously discussed. In default of the exercise of such powers, the trustees should be directed to stand possessed of the fund—

In default of appointment.

(vi) *Upon trust for the children of the marriage in equal shares, the sons at twenty-one, and the daughters at twenty-one or marriage.*

Rule against Perpetuities.

It will be observed that this clause, as drawn, entirely obviates any possibility of the trusts of the settlement infringing the Rule against Perpetuities. But it does more than this. By making the vesting of the children's shares contingent upon their attaining twenty-one (or, in the case of daughters, being married[3]), the danger that a part of the fund might escape the settlement by the death of one of the children under age, is also avoided. If a child so dying had attained a vested interest, his share would, of course, go to his next of kin, i. e. (probably) his father, and the provision for the other children would be proportionately diminished.

Period of vesting.

It may, however, be specially provided that, in the event of the death of one of the children under age, but leaving issue, his issue shall take the share to which their parent was presumptively entitled under the settlement. But such a proviso

[1] Otherwise the Rule against Perpetuities would be infringed.

[2] For a form of such sub-settlement, see Davidson, *Concise Precedents*, No. cix.

[3] When their share could, of course, be settled under the provisions of the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43).

must always carefully be made subject to the exercise of the previous power of appointment, in favour of the other objects of the settlement.

Hotchpot clause.

Once more, great injustice might be done, if a child to whom an appointment had been made were allowed to claim a share of the residue of the fund, without deducting the value of the share already appointed to him or her. In the case of distribution on intestacy, this contingency is, as we have already seen, provided for by law[1]. But, inasmuch as the distribution of a settlement fund, even on default of appointment, is not a distribution on intestacy, it is necessary to insert an express 'hotchpot' clause, excluding those children who have already taken their shares by appointment, or compelling them to bring into account the benefits already received under the Power of appointment.

Finally, in the event of the total failure of issue of the marriage before the period of vesting, the ultimate destination of the fund is provided for, by directing the trustees to stand possessed thereof—

Ultimate trusts of capital.

(vii) *Upon trust for the intended husband and wife, in proportion to the amounts of property contributed by each respectively.*

This final disposition cannot, of course, take effect until the death of one of the spouses, for, until that event, it can never be certain that there will be no issue. But the person to whom such a disposition enures can, notwithstanding, dispose of it in anticipation, by Will or otherwise. It is a contingent equitable interest.

Powers under settlements.

Having now followed the steps by which the devolution of the settled property is regulated in Real and Personal Settlements respectively, we must turn to the important subject of the powers exerciseable under settlements. These will be found to group themselves naturally into two classes, according as they are exercised by (*a*) beneficiaries, and (*b*) trustees.

[1] Ante, pp. 211-2.

And each of these classes will again subdivide naturally into (*a*) powers conferred by law, and (*b*) powers conferred by the express terms of the settlement.

Powers of beneficiaries.

A. Powers of beneficiaries.

These are, naturally, powers belonging to 'limited owners,' i. e. persons entitled to the temporary enjoyment of the settled property. Persons in whom complete ownership is vested exercise, of course, the ordinary powers of owners. As to them, in fact, the settlement has ceased to operate.

Conferred by law.

(*a*) *Legal powers of beneficiaries.*

It need hardly be said that the 'limited owner' under a settlement, has, as incident to his interest, the power of dealing with that interest for his own benefit, in any way, and to any extent, that he may choose. The only exceptions to this rule are (*a*) married women, who, as we have seen [1], may be 'restrained from anticipation' during their covertures, and (*b*) infants and other persons under disability, who, by reason of their personal incapacity, are, to a greater or less extent, restrained from dealing with their interests [2]. Subject to these exceptions, the ordinary powers of disposition and dealing incident to ownership, legal and equitable, attach to the interest of the limited owner under a settlement, and no provisions of the settlement can impair their exercise [3].

But it has, in recent years, been the policy of the law, to confer upon the limited owner very wide powers affecting, not only his own interest, but the whole of the property comprised in the settlement. These powers are of an administrative character only. It is not intended that the limited owner shall be able to affect the beneficial interests arising under the settlement; and, in exercising them, he is usually subject to restrictions imposed in the interest of other parties which go far to place him in a fiduciary position [4]. The

[1] Ante, pp. 282–4.

[2] See cap. xvii.

[3] Ante, p. 186. And see, especially, Settled Land Act, 1882 (45 & 46 Vict. c. 38) § 51.

[4] ib. § 53.

peculiar character of his statutory powers is also marked by the fact that they are exerciseable, in most cases, even after the limited owner has alienated his own interest [1]. Inasmuch as we have already considered the details of most of these legal powers, in dealing with the estate for life, it is not necessary to do more here than recapitulate them. The most important are:—

(i) To sell,
(ii) To exchange,
(iii) To make partition,
(iv) To enfranchise copyholds,
(v) To effect improvements,
(vi) To grant leases,
(vii) To dedicate to the public,
(viii) To mortgage for special purposes [2].

Custody of title deeds.

And to these may be added a somewhat important power, not conferred by any special statute, but recognized by courts of Equity, to obtain the custody of the title deeds [3]. It is a power which the Courts will watch with some jealousy; for it undoubtedly makes it easy for the limited owner to commit serious frauds [4]. And it is a right of the legal tenant for life only, though there have been cases in which the equitable tenant for life, having obtained possession of the title deeds, has been allowed to retain it [5]. In spite of the obscure and inconsistent wording of the Acts [6], it seems the better opinion, that the statutory powers of administration of the limited owner, can be executed by the owners of equitable as

[1] This is true of the powers vested in a tenant for life in possession by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74) § 22, and the Settled Land Act, 1882 (45 & 46 Vict. c. 38) § 50.

[2] ib. §§ 3–18. See ante, pp. 47–53.

[3] *Leathes* v. *Leathes* (1877) 5 Ch. D. 221.

[4] *Jenner* v. *Morris* (1866) L. R. 1 Ch. App. 603.

[5] *Lady Langdale* v. *Briggs* (1856) 8 De G. M. & G. at p. 416. But this was a consent case. And see *Re Newen*, 1894, 2 Ch. 297.

[6] e. g. Improvement of Land Act, 1864 (27 & 28 Vict. c. 114) § 8; Settled Estates Act, 1877 (40 & 41 Vict. c. 18) § 46; and Settled Land Act, 1882 (45 & 46 Vict. c. 38) § 2 (5).

well as of legal interests[1]. But the limited owner of an undivided share cannot exercise his statutory powers, without the co-operation of the tenants for life of the other undivided shares, claiming under the same settlement[2].

Express Powers.

(*b*) *Express Powers of beneficiaries.* The statutory powers being necessarily intended for typical cases, the special circumstances of a settlement often require the supplementing of them by additional clauses. Thus, for example, it may be desired to give the tenant for life power to dispose by way of sale or lease of the principal mansion house, contrary to the provisions of the Settled Land Acts[3]; or to authorize him to grant leases for longer than the statutory terms. He may also be empowered to accelerate the periods at which the portions trustees may raise portions; and his consent may be, and often is, made essential to the variation of investments by the trustees of a Personal Settlement. He may likewise have the Power of appointing new trustees[4].

But the most important Powers conferred by the express terms of a settlement upon a tenant for life are those which enable him to dispose of the beneficial interests in the settled property, or, as we may call them, 'dispositive' Powers. The most usual of these may here be enumerated.

To jointure.

(i) *To jointure, or to charge income with an annuity in favour of a future wife or husband.*

Where the property is contributed by the husband, it is not unusual to stipulate that, in the event of the death of the intended wife, he shall be at liberty, on the occasion of a future marriage, to appoint a legal rent charge, or (in the case of a Personal Settlement) to appropriate a portion of the income, by way of pin-money or jointure for the future wife. As by the death of the first wife her claims to pin-money

[1] Wolstenholme & Turner, *Settled Land Act*, p. 12. See *Pocock's and Prankerd's Contract*, 1896, 1 Ch. 302.

[2] Settled Land Act, 1882 (45 & 46 Vict. c. 38) § 2 (6).

[3] ib. § 15; and Settled Land Act, 1890 (53 & 54 Vict. c. 69) § 10.

[4] Trustee Act, 1893 (56 & 57 Vict. c. 53) §§ 10–12. This Power will extend to the appointment of 'trustees for the purposes of the Settled Land Acts,' ib. § 47. See post, pp. 428–9.

and jointure are gone, the existence of this clause need not unduly burden the estate. A similar course of reasoning often confers upon a wife whose property is brought into settlement, a right to appoint an annuity to a future husband. In the case of Real Settlements, the clause appears to be usually made by way of proviso[1]; but any exercise of it would take effect by way of use carved out of the seisin of the general trustees. In the case of Personal Settlements, the appointment would operate simply as an assignment of an equitable interest. The Power should be given only to the limited owner in possession; to prevent multiplicity of charges.

To appoint portions.

(ii) *To appoint shares of portions, when raised.*

This is one of the most important dispositive Powers given to a limited owner. It applies equally to the distribution of 'portions' in the technical sense, i. e. sums raised by way of mortgage under a Real Settlement, and to shares of capital under a Personal Settlement. And as there is now, as we have seen[2], no equitable restriction upon the exercise of Powers of Appointment, it is very necessary that the limits of the Power should be carefully defined by the settlement. It may be made exerciseable by husband and wife jointly, and by the survivor, or by each of the parties in respect of the property contributed by him or her. The conditions and mode of exercise of Powers of Appointment have been fully discussed in an earlier chapter[3].

Revocation and resettlement.

(iii) *To revoke and resettle.* This is a Power which must, of course, be handled with the greatest caution, as its exercise involves the existence of the whole settlement. But, where the settlement is voluntary, or, in a settlement for value, when the main purposes of the settlement, e. g. provision for wife and issue, have been exhausted, it is not uncommon to give the settlor power to resettle the property. The objects of his future bounty should, however, be clearly designated,

[1] Vaizey, *Settlements*, vol. iii. p. 13; Key & Elphinstone, *Precedents*, vol ii. p. 603.

[2] Ante, pp. 122-3.

[3] Ante, cap. vii.

if it is not really intended to give the settlor a free hand. A modified form of this clause may be found in the Power—

Future portions.

(iv) *To raise portions for children of a future marriage,* which may be found both in Real and Personal Settlements. In the former case, it takes the shape of a proviso, that the limited owner shall be entitled, upon remarriage, to charge a limited sum for portions for the children of his second marriage, to be disposed of and administered in the same way as the portions directed to be raised by the settlement itself, and to appoint the premises charged for a term of years by way of security[1]. In a case of a Personal Settlement, it operates by way of Power to revoke the trusts of the capital money to a specified extent, which is usually to be determined by the number of the children of the first marriage, and to appoint other trusts in substitution for them, in favour of the children of the subsequent marriage[2].

Advancement.

(v) *To direct advancement of infants' shares.*

As we shall hereafter see, the trustees of property secured for the benefit of infants are entitled, at their own discretion, to employ any part of the available income of such property for the maintenance of the infants during their minority. But it frequently happens, e. g. in the ordinary case of a Personal Settlement during the lifetime of the tenant for life, that there is no available income; or, again, that the income is inadequate for the purpose. It is, therefore, very important, that the trustees should be empowered to raise, by way of anticipation, a part of the expectant share to which such an infant or other beneficiary may be entitled; and this object is effected by what is known as the 'advancement clause.' By the terms of this clause, the trustees are authorized to anticipate the natural time for payment of the share of any beneficiary, for the purpose of his or her permanent advancement in life, e. g. to provide capital to start a business, to

[1] Vaizey, *Settlements*, vol. iii. pp. 14, 15; Key & Elphinstone, *Precedents* (3rd ed.) vol. ii. pp. 606, 607.

[2] Vaizey, *Settlements*, vol. iii. pp. 117–20.

purchase an outfit to enable the beneficiary to take up a foreign appointment, or to furnish a lady's marriage trousseau. And, as the exercise of this Power of advancement is usually made at the expense of the tenant for life[1], whose income is diminished by the process, it is the rule to make that exercise dependent upon his direction. So that the Power of advancement, though technically a Power belonging to the trustees, is really a Power exerciseable by the tenant for life. As it is one which does not exist independently of express provision[2], great care should be taken to word the Power in such a way as to cover all possible requirements—e. g. to define liberally the purposes for which it may be exercised, to make it applicable to beneficiaries of full age as well as to infants, and to beneficiaries contingently, as well as to those absolutely entitled, to shares in the portions fund. In Real Settlements, the Power of advancement is exercised by a mortgage of the settled property under the Power, the interest being kept down by the tenant for life, and the capital being finally deducted from the share payable to the beneficiary receiving the advancement. In Personal Settlements, the trustees advance part of the trust fund, thereby proportionately diminishing the income of the tenant for life, and debiting the beneficiary with the amount against the ultimate distribution. If the beneficiary is only contingently interested, e. g. on his attaining the age of twenty-one years, and he dies before becoming absolutely entitled, the loss falls, of course, upon the other beneficiaries. A tenant for life who has assigned his interest will not be allowed to diminish the income of his assignee, by exercising his Power of advancement[3].

B. Powers of trustees.

Powers of trustees.

We now come to deal with the powers, implied and express,

[1] It may, of course, be possible for the trustees to sell or mortgage a part of the expectant share of the beneficiary as a reversionary interest purely. But such a process is only effected at a sacrifice.

[2] *Walker* v. *Wetherell* (1801) 6 Ves. Jr. 473. But the Court may sanction such a step, even when there is no direction.

[3] *Nottidge* v. *Green* (1876) 33 L. T. (N. S.) 220. But he may probably do so if the assignee consents. *In re Cooper* (1884) 27 Ch. D. 565.

which are exerciseable by trustees of settlements in virtue of their fiduciary position. These powers are, naturally, of an administrative character only; it is not intended that the trustees shall exercise disposing powers over the beneficial interests under the settlement.

Trustees for the purposes of the Settled Land Acts.

But before dealing with the powers of trustees in detail, it is necessary to allude, briefly, to a difficulty which has arisen from the wording of a recent statute. It was the policy of the Settled Land Act, 1882 [1], to vest certain important rights, powers, and duties, in trustees of settlements. But it not infrequently happens, as we have seen, that there are two or more groups of trustees connected with a settlement; and the question then arises—by which of such groups may the rights and powers of trustees under the Settled Land Acts be exercised, and upon which are the duties incumbent? This question the Acts themselves endeavour to answer, by providing that they shall belong to (1) those trustees who, under the settlement, are trustees for sale of the land concerning which the question arises, or with power of consent to or approval of the exercise of a power of sale of such land, or (2) if there be no such persons, then the persons declared by the settlement to be trustees for the purposes of the Settled Land Acts [2], or (3) failing these, persons having similar powers with regard to other land comprised in the same settlement [3], or (4) failing these, persons having future powers or trusts for sale (absolute or contingent) or powers to consent to or approve of the exercise of such powers [4]. The result of these provisions is, to mark off a special class of 'trustees for the purposes of the Settled Land Acts,' who alone can exercise the powers conferred by statute on such trustees. These will usually correspond

[1] 45 & 46 Vict. c. 38.

[2] ib. §. 2 (8). A trustee having a Power of sale subject to the consent of a tenant for life, has been held to be a 'trustee for the purposes of the Acts.' *Constable* v. *Constable* (1886) 32 Ch. D. 233.

[3] This definition was necessary to provide for the difficult cases in which there was no power of sale, e. g. the principal mansion house.

[4] Settled Land Act, 1890 (53 & 54 Vict. c. 69), § 16.

with the 'general trustees' of the settlement; but, of course, only if the latter fulfil the statutory requirements. It is an useful practice to name, in the settlement itself, the 'trustees for the purposes of the Settled Land Acts.'

We now come to specify some of the more important powers belonging to trustees of settlements. And first,

(*a*) *Implied powers of trustees.* Implied powers.

A trustee has, from the nature of the case, such powers of dealing with the property entrusted to him, as are absolutely necessary to enable him to perform his duty. But as it is often a very difficult question to decide how far a certain step is strictly necessary, trustees are very unwilling to rely upon this general power, and persons dealing with them are still more unwilling to do so. Practically, therefore, a trustee relies, in every case, either upon the express provisions of the settlement, or upon the terms of a statute. The statutory powers of a trustee arise chiefly from Acts of Parliament passed since the middle of the present century, the most important now in force being Lord St. Leonards' Act of 1859 [1], the Conveyancing Act, 1881 [2], the Settled Land Act, 1882, and its amendments [3], and the Trustee Act, 1893, and its amendments [4]. The chief of them may be enumerated:—

(i) *To sell property incumbered with debts.* Sale of incumbered property.

This power was created by one of the surviving clauses of Lord St. Leonards' Act. It applies only to cases of settlements made by Will coming into operation after August 12, 1859, where the testator has charged his real estate, or any portion of it, with payment of his debts or legacies, and has devised the whole of his interest to trustees [5]. Where there has been no such devise, the power of sale belongs to the executors [6]. It is probable, that the value of this section will be practically abolished by the operation of the Land Transfer

[1] 22 & 23 Vict. c. 35. [2] 44 & 45 Vict. c. 41.
[3] 45 & 46 Vict. c. 38; 47 & 48 Vict. (1884) c. 18; 50 & 51 Vict. (1887) c. 30; 52 & 53 Vict. (1889) c. 36; 53 & 54 Vict. (1890) c. 69.
[4] 56 & 57 Vict. c. 53; 57 & 58 Vict. (1894) c. 10; 59 & 60 Vic. (1896) c. 35.
[5] 22 & 23 Vict. (1859) c. 35. § 14. [6] ib. § 16.

Act, 1897 [1], under which the land will be sold in all such cases by the personal representatives.

Management of infants' lands.

(ii) *To manage the land of infants.*

This is a power conferred by the Conveyancing Act, 1881 [2], and it includes the power to cut timber, build and repair houses, work mines (but not to open new ones), improve and drain the land, insure against fire, accept surrenders of leases, and accumulate surplus income. In spite of the loose wording of the section, it seems probable that these powers only belong to trustees acting under a settlement coming into operation since December 31, 1881 [3]. The accumulations of income go either to the infant on his attaining his majority (or, being a woman, on her marriage), or are carried over to the further trusts of the settlement, if any, or belong to the infant's personal representatives [4]. This section, of course, diminishes considerably the powers of an infant's guardian in the cases to which it applies.

Maintenance of infants.

(iii) *To maintain infants.*

Trustees have a general power to expend the income of property to which an infant is entitled, either contingently or on an event which must happen not later than his twenty-first birthday, for the maintenance, education, or benefit of the infant. The money may be paid to the infant's parent or guardian, and may be allowed by the trustees, whether the infant has other provision for his maintenance, or not [5]. The accumulations of surplus will belong to the persons ultimately entitled to the property [6]. This power may be modified by the express terms of the settlement; but, in the absence of such modification, it applies to settlements of any date [7].

Exercise of statutory powers of infant tenant for life.

(iv) *To exercise the powers of an infant tenant for life under the Settled Land Acts.*

This power is conferred by section 60 of the principal Act [8], and, of course, it greatly increases the powers of trustees

[1] 60 & 61 Vict. c. 65. § 2 (2). [2] 44 & 45 Vict. c. 41. § 42.
[3] ib. § 42 (8). [4] ib. § 42 (7).
[5] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 43 (1).
[6] ib. § 43 (2). [7] ib. § 43 (3) (4). [8] 45 & 46 Vict. (1882) c. 38. § 60.

whose tenant for life is an infant. It does not, however, apply to the case of an infant married woman, whose powers are, presumably, exerciseable by her husband [1]. Neither does it extend to cases of other tenants for life under disability, e. g. lunatics [2].

(v) *To receive purchase money on dispositions by limited owners.* Receipt of purchase money on sale by tenant for life.

This is one of the most important provisions of the Settled Land Act [3], and is the great safeguard against malpractices by a tenant for life. It includes the ancillary powers of investing the 'capital money' so received, i. e. money which is to be secured to answer the trusts of the settlement [4], or its expenditure on the improvement of other parts of the settled land [5], of authorizing the cutting of timber by limited owners not entitled to commit Waste [6], and the apportionment between capital and income on sales of leaseholds [7]. A limited owner, exercising his powers of disposition under the Settled Land Acts, must give notice to the trustees [8]; and in some cases their consent is necessary to the sale by a tenant for life [9]. But the latter may insist upon capital money being paid into court instead of to the trustees [10]; and his consent is necessary to investments [11].

(vi) *To invest and vary investments.* Investment.

This brings us naturally to the very important powers of trustees, with regard to investment of trust funds. It is one of the best settled rules of Equity, that a trustee is never justified in keeping any capital money, i. e. money not immediately claimable as income by beneficiaries, uninvested, a moment longer than is necessary to find a suitable investment [12].

[1] 45 & 46 Vict. (1882) c. 38. § 61. The wording of the section is peculiar, and it is impossible to say what was the real meaning of the Legislature.
[2] ib. § 62. [3] ib. § 22. [4] ib. § 2 (9).
[5] ib. §§ 21 (2), 25, 26. [6] ib. § 35. [7] ib. § 34.
[8] ib. § 45. Notice is not necessary when the disposition is a lease not exceeding twenty-one years (Settled Land Act, 1890, 53 & 54 Vict. c. 69. § 7 (i)).
[9] Settled Land Act, 1890 (53 & 54 Vict. c. 69. § 7 (i)), § 10 (2).
[10] Settled Land Act, 1882 (45 & 46 Vict. c. 38), § 22 (1).
[11] ib. § 22 (2). [12] *Moyle* v. *Moyle* (1831) 2 Russ & M. 710.

If he does so, he will be answerable for any loss which may happen in consequence. But he is not at liberty to make any investments which he pleases. Subject to the terms of the settlement, he can only be safe in investing in one or more of the securities authorized by law. A list of these securities is now to be found in section 1 of the Trustee Act, 1893, and may be summarized as follows:—

(α) Public funds of the United Kingdom[1],

(β) Real securities[2] in Great Britain and Ireland,

(γ) Stock of the Banks of England and Ireland,

(δ) Certain Indian Government stocks, and stocks of Indian railways, the produce whereof is guaranteed by the Indian Government,

(ϵ) Metropolitan Consols,

(ζ) Certain stock of certain railway and water companies and commissions, and of certain municipal boroughs and of county councils,

(η) Securities authorized from time to time for investment of cash under the control of the High Court[3].

The existing order of the Supreme Court on the subject of investments is dated November 26, 1888, and makes practically no alteration in the scope of the investing powers[4] of trustees.

Variation of investments.

The power to vary investments is expressly given by statute[5]; and, like the power of investment itself, must be exercised according to the discretion of the trustees[6]. In

Mortgages.

lending on mortgage, even if the security itself is *primâ facie* correct, the trustees must see that a margin of security, amounting to one-third of the value of the property, is left to allow for contingencies[7]; but they will be justified, within these limits, in relying upon the report of an apparently able

[1] Including securities the interest of which is guaranteed by Parliament.

[2] Including mortgages of leaseholds with 200 years to run at rents not exceeding 1*s.* a year, and charges under Improvement of Land Act, 1864.

[3] Trustee Act, 1893 (56 & 57 Vict. c. 53) § 1.

[4] See the Order in *Annual Practice* (1899) vol. i. p. 318.

[5] Trustee Act, 1893 (56 & 57 Vict. c. 53) § 1. [6] ib. § 3. [7] ib. § 8 (1).

and independent surveyor[1]. If they exceed the proper proportion, they will be liable for the surplus only, not for the whole investment[2]. In lending money on leaseholds, trustees may dispense with the investigation of the lessor's title[3]; and on a loan or purchase of any property may accept less than the strict length of title[4].

(vii) *To appoint new trustees.* New trustees.

Provision for the appointment of new trustees may be made by the settlement itself; but, in default of provision, whenever a trustee dies, or retires, or becomes incapable of acting, the surviving trustees may by writing appoint his successor, who will have all the powers of the former trustee[5]. It is not necessary (in the absence of direction) to fill up the number of trustees beyond two; but the number must never be allowed to fall below two, unless where a single trustee was originally appointed by the settlement[6]. Where there are more than two trustees, any one of them, with the consent of his co-trustees and the person entitled to appoint, may by deed withdraw from the trust[7]; but, in other cases, a trustee who has once accepted cannot resign[8]. Whenever there is any difficulty in the way of appointment of trustees by the parties, the assistance of the Court may be invoked; and the Court has power, in any case, to appoint a trustee in substitution for a convicted felon or a bankrupt[9]. When a new trustee is appointed by the Court, the Court makes an order declaring the property to be vested in him[10]; and it has power to do the like, in the event of there being any uncertainty as to the person in whom a trust estate is vested, Vesting orders.

[1] Trustee Act, 1893 (56 & 57 Vict. c. 53), § 8 (1). [2] ib. § 9 (1).
[3] ib. § 8 (2). [4] ib. § 8 (3). [5] ib. § 10 (1).
[6] ib. § 10 (2) (c). But, where the settlement came into operation after December 31, 1881, the single survivor of trustees may, in the absence of express prohibition, exercise all trusts and powers vested in the trustees jointly.
[7] ib. § 11 (1). [8] He may, however, be discharged by the Court.
[9] ib. § 25 (1). The trust estates of a felon do not vest in his administrator, but remain unaffected by his conviction (ib. § 48).
[10] ib. § 26 (1).

or when, owing to infancy, absence, or other incapacity, it is difficult to procure a conveyance of the legal estate[1]. When a change of trustees is effected by the parties, provision should be made for transfer of the trust property; but a mere declaration by the appointor in the deed of appointment is sufficient[2]. All the powers of the Trustee Act, respecting the appointment of new trustees and the retirement of trustees, apply to 'trustees for the purposes of the Settled Land Acts[3].'

Method of sale.

(viii) *To sell in manner deemed desirable.*

Formerly a trustee exercising a power of or trust for sale was bound to exercise it according to elaborate rules, intended to guard against alienation of trust property at an under value. But now he may sell in such manner and on such conditions as he may think fit, and subject to the terms of the Vendor and Purchaser Act, 1874, relative to the obligations of vendor and purchaser[4]. His receipts are conclusive in favour of purchasers; and he may authorize a solicitor to receive the purchase-money[5]. But he must not leave the money lying in the hands of an agent[6].

Insurance.

(ix) *To insure.*

A trustee may insure any building comprised in the trust property to the extent of three-fourths of its value, and charge the expense on the estate[7].

Renewal of leaseholds.

(x) *To renew leaseholds.*

A trustee of leaseholds renewable by custom or contract may, and, if required by the beneficiaries interested, must endeavour to obtain a renewal, unless there is provision to the contrary in the settlement[8]. He may use other property

[1] Trustee Act, 1893 (56 & 57 Vict. c. 53), § 26 (2) 28-32. But the Court may, if it pleases, appoint a person to convey instead, ib. § 33.

[2] ib. § 12 (1). [3] ib. § 47.

[4] ib. §§ 13-15. These terms considerably abridged the rights formerly belonging to a purchaser under an open contract in respect of investigation of the lessor's title (37 & 38 Vict. c. 78. §§ 1-3, 13).

[5] Trustee Act, 1893 (56 & 57 Vict. c. 53), §§ 17, 20. [6] ib. § 17 (3).

[7] ib. § 18. But this power does not apply where he is only a 'bare trustee,' i.e. a trustee with no active duties to perform.

[8] ib. § 19 (1).

subject to the same trusts, or mortgage the property comprised in the new leases, to furnish the necessary expenses [1].

(xi) *To accept evidence of liabilities and compound claims.* Compromise of claims.

A trustee is not entitled to diminish the trust property, by admitting unfounded liabilities or foregoing just claims. But there are many cases in which a prudent man, acting in his own affairs, will acknowledge a liability, the strict legality of which he doubts, rather than contest the matter. And, similarly, a prudent man will often accept a composition for an undoubtedly good claim, rather than run the risk of losing all by pressing for the whole. Formerly trustees had not this discretion, in the absence of express authority; now it is conferred on them by statute [2].

(xii) *To pay money into Court.* Payment of money into Court.

One of the most valuable powers at the disposal of a trustee is the right to pay trust funds into Court. This step virtually relieves the trustee of all responsibility for the safety and due distribution of the money; but, as it entails expense on the trust estate, it should not be resorted to except in cases of *bonâ fide* doubt or difficulty. A majority of the trustees is sufficient to authorize the step; at least so far as moneys under their own control are concerned [3].

(xiii) *To call upon a beneficiary to indemnify.* Indemnity by beneficiaries.

As a rule, a trustee who commits a breach of trust, however technical, must bear the loss consequent thereon [4]. But, if the breach has been committed at the written request of a beneficiary (even though the latter be a married woman restrained from anticipation), the Court may impound all or any part of the beneficiary's interest in the trust estate, for the purpose of indemnifying the trustee [5].

(*b*) *Express powers of trustees.* Express powers.

The powers conferred by law upon trustees are now so extensive, that the need for enlarging them has become almost

[1] Trustee Act, 1893 (56 & 57 Vict. c. 53), § 19 (2). [2] ib. § 21. [3] ib. § 42.
[4] For an exception to this rule, see Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), § 3. [5] Trustee Act, 1893 (56 & 57 Vict. c. 53), § 45.

non-existent. It may, however, be considered desirable in some cases to restrict the statutory powers of trustees, though this should never be done without substantial cause. The following are one or two fairly common examples of express trustee powers still to be found in settlements:—

Delay in conversion.

(i) *To delay conversion.*

It is necessary, as previously explained, to direct a trust for conversion of land brought into a Personal Settlement, in order to stamp the property with the character of personalty[1]. But, when once the trust has been imposed, it is quite safe to give the trustees a power to postpone the actual sale. No doubt, even in the absence of such a power, they would be justified in waiting until a convenient opportunity of sale occurred; but an express power can authorize them to do much more than this, in fact to treat the land as a permanent investment.

Dealing with portions terms.

(ii) *To deal with portions terms.*

In the absence of express directions, the trustees' powers with regard to raising portions might be deemed to be exhausted by a single act of alienation. It is well, therefore, to give the trustees considerable discretion as to the manner of dealing[2], by sale or mortgage, as often as occasion may require, or by accumulation of income, or sale of timber, or working of mines, with the subject matter of the portions term. In spite of the protection of the Trustee Act, it is still better to provide expressly, that purchasers from the portions trustees shall not be bound to see that a case for the exercise of the power has arisen. The power to advance has been dealt with previously[3].

(iii) *To invest in unauthorized securities.*

The list of securities in which trustees are authorized by law to invest[4] may, if deemed desirable, be increased by the addition of other investments, e. g. purchase of freeholds, and

[1] Ante, p. 418.
[2] Subject, it may be, to the consent of the tenant for life.
[3] Ante, pp. 426-7.
[4] See ante, p. 432.

purchase or mortgage of leaseholds. If it is desired to give the trustees of a settlement of English land power to invest in land elsewhere, express provision must be made for the purpose[1]. If leaseholds are authorized, either for mortgage or purchase, the kind of leaseholds admissible must be carefully specified. It is not uncommon, in a marriage settlement of money or stock, to authorize the trustees to purchase a house for the residence of the tenants for life. They may also be empowered to lend money to a beneficiary on mortgage of proper securities, or even, in certain cases, on personal guarantee[2].

(iv) *To pay premiums on life policies.* To pay life premiums.

If the settled property comprise policies of life insurance, which the tenants for life, or either of them, have covenanted to keep up, power should be given to the trustees, to appropriate the income of the settled property towards making good any deficiencies in the performance of such covenants, and to satisfy themselves by insisting on the production of receipts. Otherwise, it might be the duty of the trustees to sue the tenant for life upon his covenant.

Covenants, as distinct from powers, are not frequent in settlements; and it is unwise to impose upon the parties legal liabilities, the enforcement of which may lead to the defeat of the main object of the arrangement, viz. to ensure a harmonious and prosperous matrimonial establishment. But, occasionally, it becomes desirable to insert covenants by the parties. For example, a husband settling leaseholds may be called upon to covenant to pay the rents and perform the covenants of the leases; on a settlement of policies of assurance, the settlor may be asked to covenant to keep them on foot. A very important and not uncommon covenant is the covenant to settle future acquired property. Before the passing of the Married Women's Property Acts, it was a frequent arrangement with regard to property coming to the husband in right of his wife; and, although, in the present

Covenants in a settlement.

To pay rents.

To keep up life insurance.

To settle future acquired property.

[1] Settled Land Act, 1882 (45 & 46 Vict. c. 38), § 23.

[2] e. g. if it is desired to enable a husband to go into business.

state of the law, it is necessary that the covenant should also be entered into by the wife[1], it has been recently decided that, if this precaution be taken, the covenant will bind the future acquired separate estate of the wife[2]. A covenant of this kind does not, of course, create any legal charge on the property becoming affected by it[3]. But, if it be made to apply to specific property, it imposes an equitable lien, which, even before performance of the covenant, will be enforceable against all persons, except purchasers for value without notice, and trustees in bankruptcy[4]. In fact, the whole settlement is sometimes made by way of covenant or 'articles,' which, whether intended to affect land or not, must be in writing[5], but which, if made for valuable consideration, such as contemplated marriage, need not be under seal. Contrary to the usual rule of law, strangers to the contract, e. g. children of the marriage, and even children of past[6] or future marriages[7], may enforce it[8]; and, if the articles comprise specific land already the property of the covenantor, it will bind the lands even against a trustee in bankruptcy, though not against a purchaser for value without notice[9]. Covenants for title having been already discussed[10], the only subject remaining

[1] It may be questioned whether the covenant of the husband is now actually necessary at all, as his consent can certainly be implied from his execution of the settlement, and no legal interest in his wife's property vests in him. But the practice is to make the husband join.

[2] *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307; *Re Stonor's Trusts* (1883) 24 Ch. D. 195.

[3] *Mornington* v. *Keane* (1858) 2 De G. and J. 292.

[4] And where the bankruptcy is that of the husband, a covenant by him to settle property acquired in right of his wife will be enforceable even against the trustee (Bankruptcy Act, 1883, 46 & 47 Vict. c. 52. § 47 (2)). If the property of the husband has been actually transferred before the bankruptcy, in performance of a covenant made on valuable consideration, the transfer will be unimpeachable. As to what constitutes performance, see *Wellesley* v. *Wellesley* (1839) 10 Sim. 256.

[5] 29 Car. II. (1677) c. 3. § 4.

[6] *Gale* v. *Gale* (1877) 6 Ch. D. 144; but only children of a widow, not those of a widower (*Re Cameron and Wells* (1887) 37 Ch. D. 32).

[7] *Clayton* v. *Earl of Wilton* (1813) 6 M. & S. 67 n.

[8] The rule does not apply to voluntary settlements (*Green* v. *Paterson* (1886) 32 Ch. D. 95).

[9] *Ex parte Poole* (1848), 1 De Gex 581.

[10] Ante, pp. 406–7.

to be dealt with in the chapter on Settlement, is the subject of Long Terms.

By a 'Long Term' in the technical sense, is intended a term of years in land, usually having several hundred years to run, and not being subject to any covenants, rents, or other liabilities on the part of the owner, which might give to the reversion a substantial value. It will have been gathered, from the description above given of the methods of a Real Settlement, how such terms usually arise. They are not *demises* at all; but are merely interests limited by way of use for periods of years, without any relationship of landlord and tenant, simply by way of security for money. As Lord Mansfield once said [1], 'No man has a lease of 2,000 years *as a lease*; but as a term to attend the inheritance.' But it must also be remembered that, in spite of Lord Mansfield's *dictum*, there may be Long Terms created by actual demise, at nominal rents, which for many purposes come under the technical definition of 'Long Terms.' It is not unusual, in the north of England, for land to be disposed of in such a way for building purposes; and a recent ingenious device of conveyancers has led to the spread of the practice, in the hope that when such Long Terms are enlarged into fees simple, under the provisions shortly to be mentioned, the restrictive covenants may be held to 'run with the land,' more perfectly than would be the case if the estate of the lessee had originally been freehold [2]. Long Terms.

Now with regard to Long Terms of either kind, one of two possibilities awaits them. Either they may never be put to actual service, or, which amounts to much the same thing, they may have been put to service, and exhausted their primary objects. Or, on the other hand, they may have got into the hands of genuine purchasers, whose whole titles depend upon their continuing to exist. Thus, in the case of a term created by a Real Settlement, there may have been no children of the

[1] *Denn* v. *Barnard* (1777) Cowp. 597.

[2] As to this point, see ante, pp. 324–7.

marriage, and so no portions may have been raised; or portions may have been raised, and subsequently paid off in the ordinary way, by the succeeding tenant in tail. In either case, the Term is said to be 'satisfied.' Or, on the other hand, the Term may have been sold or mortgaged to a genuine purchaser or mortgagee, whose whole title depends on its continued existence. In the former case, the Term is a nuisance, because it complicates the title to the settled property; in the latter, it is a snare, because, with the lapse of time, its owners forget the character of their interest, and treat themselves as owners in fee, often with awkward results. For each of these cases the Legislature has made provision.

Satisfied terms.

In the former case, that of the 'Satisfied Term,' it might have seemed possible, at one time, to treat the interest as at an end by failure of the objects of the use. But the caution of conveyancers long ago settled that, until such a Term had actually merged in the reversion, by surrender or otherwise, it was still subsisting. And, in fact, they very seldom allowed it to merge. If, for example, a tenant in tail paid off the portions charges, his advisers did not allow him to take a surrender of the Term, but insisted upon the latter being conveyed to a trustee or trustees 'upon trust to attend the inheritance,' i. e. for the benefit of the persons from time to time entitled to the next vested estate of inheritance, expectant upon the expiry of the Term. This practice was deemed to afford some protection to the freeholder, against possible incumbrances created by previous tenants in tail. But, in reality, its disadvantages far outweighed its advantages; for, if all went right, its existence was a source of infinite expense whenever the title was dealt with, and, if the trustee of the Term were fraudulent, he could dispose of it to a third person, in a way which would practically defeat the owner of the inheritance.

Act of 1845.

Accordingly, in the year 1845, the Satisfied Terms Act[1] provided that terms of years which, on December 31, 1845,

[1] 8 & 9 Vict. c. 112. § 1.

were 'attendant upon the inheritance,' should, as from that date, cease altogether, except for the purpose of affording such protection as they then actually afforded[1]; and that Terms subsequently becoming 'in trust to attend the inheritance,' should thereupon absolutely cease[2].

Subsisting terms.

In the second case, in which the Term was actually in the hands of a genuine owner, relief was longer in coming. Until the year 1845, indeed, a partial remedy was always open to such a person; for, by making a feoffment in fee, he could create a tortious or 'base' fee which, for many purposes, would be equivalent to a fee simple, and which would ripen by long possession into an indefeasible fee. But, the 'tortious operation of a feoffment' having been abolished in the year 1845[3], this partial remedy disappeared.

Enlargement.

A bolder step was taken by the Conveyancing Act, 1881[4], which provides, that the beneficial owner or trustee in possession of a Term originally created for not less than 300 years, and of which 200 years are yet unexpired, and upon which there is not reserved any rent of a money value which can still be enforced, and which is not affected by any trust or right of redemption in favour of the freeholder, may by deed declare that the Term shall enlarge into a fee simple. Thereupon the Term does so enlarge, and the owner of the term, or his assignee, becomes entitled in fee simple[5], subject to all such trusts, powers, rights, and obligations as affected the Term. A very necessary qualification, imposed by the Conveyancing Act, 1882[6], provided that this power of enlargement should not be exercised in respect of—

(*a*) A Term liable to be put an end to by re-entry for condition broken,

[1] i. e. such a Term was to have the same effect as it would have had if not assigned or dealt with subsequently to December 31, 1845.

[2] 8 & 9 Vict. c. 112. § 2.

[3] 8 & 9 Vict. c. 106. § 4.

[4] 44 & 45 Vict. c. 41. § 65.

[5] Including mines and minerals, even where the term was originally not 'without impeachment of waste,' ib. § 65 (6).

[6] 45 & 46 Vict. c. 39. § 11.

(*b*) A Term created by sub-demise out of a superior Term, itself incapable of being enlarged under the statute.

Considerable reliance has been placed on the section; and there have been one or two cases turning upon its construction [1].

[1] e. g. *Re Chapman and Hobbs* (1885) 29 Ch. D. 1007; *Re Smith and Stott* (1883) ib. p. 1009 n.

CHAPTER XXVI.

REGISTRATION OF TITLE.

Disappearance of 'notorious' conveyances.

It has been previously hinted, that the rapid disuse of formal investitures which followed upon the passing of the Statute of Uses [1], was not an unmixed advantage from a public point of view. Granted that speedy and simple methods of conveyancing are desirable, it must be remembered that speed and simplicity may be too dearly bought at the expense of uncertainty of title. And, as it is by no means indisputable, that the conveyancing system which grew up under the Statute of Uses [1], was either speedier or simpler than that which preceded it, the effects of the Statute upon the practice of conveyancing must be regarded as doubtful benefits. In particular, the Statute practically put an end to the possibility of maintaining a register of seisins, an useful institution which, in one form or another, survived in countries which did not abandon the formal methods of conveyancing till a later date, and which, with substantial reforms, is still in existence in those countries. In England, therefore, the laborious and costly efforts made by the Legislature in late years, to protect *bonâ fide* purchasers of land from the consequences of secret dealings with title, have really been rendered necessary by the premature abandonment of medieval methods of conveyancing.

Yorkshire Registries.

The first of these efforts, if we except statutes such as the 13 Eliz. c. 5 and the Statute of Frauds [2], which were really

[1] 27 Hen. VIII. (1535) c. 10.

[2] 29 Car. II. (1677) c. 3.

attempts in the same direction, though by other means, was the West Riding Registry Act of 1703[1], which was followed in 1707 by the East Riding Act[2], and in 1735 by the North Riding Act[3]. The effect of these three statutes, which, it is to be observed, were passed upon the petition of the 'justices of the peace, gentlemen, and freeholders' of the districts affected[4], and which were (in two cases at least) avowedly provoked by the possibility of secret conveyances[5], provided for the establishment of registries at Wakefield, Beverly, and a place in the North Riding to be chosen[6], and for the entering in such registries of memorials of all deeds and Wills, affecting freehold or beneficial leasehold interests in lands in Yorkshire. In the two later Acts, provision is also made for registering judgements and recognizances[7]; and registration under the Acts is made to dispense with the necessity of enrolment of Bargains and Sales, under the Statute of Inrolments of 1536[8].

Act of 1884.

These statutes, after having been in force for a century and a half, were repealed and superseded by the Yorkshire Registries Act, 1884[9], which at present controls the practice of registration of deeds in Yorkshire. By virtue of this statute, all assurances (including Wills and Orders of Court) affecting any lands in Yorkshire, may be registered in the appropriate registry, by the deposit either of a memorial containing the most important particulars, or a copy of the document itself[10]. A notice of the registration is then endorsed on the original document[11]; and the effect of proper registration is, to enable the claimant under the registered document to obtain priority over all unregistered competitors, of whose claims he had no notice when he paid his money,

[1] 2 & 3 Anne, c. 4.
[2] 6 Anne, c. 62.
[3] 8 Geo. II. c. 6.
[4] Preambles of the statutes.
[5] Preambles of 6 Anne, c. 62, and 8 Geo. II. c. 6.
[6] Northallerton was ultimately selected.
[7] 6 Anne (1707) c. 62. § 19; 8 Geo. II. (1735) c. 6. § 1.
[8] 6 Anne (1707) c. 62. § 16; 8 Geo. II. (1735) c. 6. § 21. This privilege had been previously extended to the West Riding by 6 Anne (1707) c. 20.
[9] 47 & 48 Vict. c. 54.
[10] ib. §§ 4, 5.
[11] ib. § 9.

and this priority will not be subject to defeat, by tacking or other getting in of the legal estate by such rival[1]. Wills and codicils take effect, not from the date of their registration, but from that of the testator's death, provided that the registration has taken place within six months of that event[2]; and it is an express provision of the Vendor and Purchaser Act, 1874, that an assurance by a devisee under a Will shall, if registered previously to an assurance by the heir[3], take effect in priority to such latter assurance, even though the Will were not registered within six months of the testator's death[4]. The great object of the scheme is, of course, to enable an intending purchaser, who diligently searches the register, to protect himself against claims by unregistered rivals. But it seems to be the law[5], in spite of the express words of the statute[6], that a registered owner, who has paid his money after receiving notice of a prior unregistered claim, will be bound by that claim on equitable grounds. On the other hand, although the Act of 1884 provided[7] that registration should itself be deemed to constitute actual notice, this section was repealed by the amending Act of the following year[8]. The management of the Yorkshire Registries was, by the Local Government Act, 1888, transferred to the County Councils of their respective Ridings[9].

Middlesex Registry.

The example set by Yorkshire was followed by Middlesex in the year 1708, when the Middlesex Registry Act[10] (part of which is still in force) provided for the registration of

[1] 47 & 48 Vict. c. 54. §§ 14, 16.

[2] ib. § 14. A claimant under a Will who cannot get it registered within six months of the testator's death may register a notice (§ 11).

[3] It seems exceedingly doubtful how far this provision will be affected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65. § 1 (1)).

[4] 37 & 38 Vict. c. 78. § 8.

[5] *Blades* v. *Blades* (1727) 1 Eq. Ca. Abr. 358, and still binding.

[6] The existing statute (section 14) provides a loophole of escape, by the provision for cases of 'actual fraud,' which is not to be found in the old Acts. But registration does not validate assurances in themselves fraudulent, nor give any preference to volunteers.

[7] ib. § 15.

[8] 48 & 49 Vict. c. 26. § 5.

[9] 51 & 52 Vict. c. 41. § 46 (4).

[10] 7 Anne, c. 20.

memorials of all conveyances, Wills and judgements, affecting land in Middlesex, upon pain of their being deemed fraudulent and void against subsequent purchasers or mortgagees for valuable Consideration[1]. The substantive sections of the Act, e.g. those determining the extent of its application[2], the effect of non-registration of Wills, the rules of priorities and notice[3], are virtually the same as those for the Yorkshire Registries; but the whole machinery of the Middlesex Registry was, by two statutes of the year 1891[4], transferred to the Land Registry established by the Land Transfer Act, 1875, shortly to be alluded to.

Later schemes.

The local and partial provisions of the Yorkshire and Middlesex Acts had, in fact, long been deemed inadequate by ardent law reformers; and, ever since the middle of the nineteenth century, more comprehensive schemes have been in the air. The chief difference between these schemes and the local systems which had preceded them was (irrespectively of area of application) that, whereas the local Acts contented themselves with requiring registration of conveyances, the new schemes contemplated registration of *title*. In other words, while the older Registries professed to take no responsibility for the genuineness, still less for the efficacy, of the assurances which they registered, the projected Land Registries were intended to afford, to purchasers of registered land, absolute or qualified guarantees of title, as well as to introduce new and simpler methods of transfer.

Lord Westbury's Acts.

The first of the more modern schemes was carried into effect

[1] 7 Anne, c. 20. § 1.

[2] In addition to copyholds and occupation leases not exceeding twenty-one years, the Act excepted chambers in Serjeants' Inn, and the Inns of Court and Chancery (section 17). It does not extend to the city of London, which is not, legally, in the county of Middlesex (Sugden, *Vendors & Purchasers*, 14th ed. vol. i. p. 732).

[3] The doctrine of constructive notice is, of course, greatly affected by the provisions of the Conveyancing Act, 1882, previously set out (ante, pp. 146–7).

[4] 54 & 55 Vict. cc. 10 and 64. But the unrepealed provisions of the Act of 1708 still apply, of course, to Middlesex land which is not compulsorily or voluntarily registered under the Land Transfer Acts.

by the Land Registry Act of 1862[1], commonly known as Lord Westbury's Act. It was accompanied by a second statute, the Declaration of Title Act, 1862[2], which aimed at enabling landowners to obtain from the Court of Chancery declarations setting forth the indefeasibility of their titles, upon previous scrutiny by the Court. Apparently, the intention of the Legislature was, to make such titles absolutely unimpeachable, at least in the hands of purchasers for value; but no opportunity of interpreting the vital sections seems to have occurred, inasmuch as the Act remained a dead letter. Under the Land Registry Act itself, some considerable number of titles were registered; but, as they were not registered as indefeasible, the protection afforded by the Act was deemed inadequate to the expense of conforming to its provisions, and the Act itself was repealed, as from December 31, 1875, by the Land Transfer Act of 1875[3].

Land Transfer Acts.

The latter statute, which was passed under the auspices of Lord Cairns, and which, with amendments, contains the law as it now stands, was originally, like Lord Westbury's Act, voluntary in its application. But its character has been greatly changed, and its importance magnified, by the passing of the Land Transfer Act, 1897[4], which provides for the gradual compulsory adoption of the system of registered transfer of land throughout England and Wales. At present, however, the scheme is only compulsory in a few London parishes, and, though the extension of the compulsory area is already provided for[5], it will be necessary for a very

[1] 25 & 26 Vict. c. 53.

[2] 25 & 26 Vict. c. 67.

[3] 38 & 39 Vict. c. 87. § 135. It would be more correct to say that no registration under Lord Westbury's Act was permitted after that day. Land registered under the Act of 1862 can still be dealt with under the provisions of that statute.

[4] 60 & 61 Vict. c. 65. § 20.

[5] By Orders in Council of July 18, and October 20, 1898, which contemplate the inclusion of the whole metropolitan area (county and city of London) by July 1, 1900.

considerable period[1] to treat the scheme as one of optional application, except in certain districts.

Registered land.

The Land Transfer Acts (which do not apply to Scotland or Ireland) provide only for the registration of freehold and leasehold titles; the leases having at least twenty-one years to run, and containing no prohibition against alienation[2]. For the application of the Acts, a term created for mortgage purposes is not a leasehold[3]; and customary freeholds, if they pass by surrender and admittance, are not freehold[4]. But the Acts cover incorporeal as well as corporeal hereditaments, except that the compulsory provisions, where they are in force, will not extend to incorporeal hereditaments, or to mines and minerals apart from the surface, or to leases having less than forty years to run or two lives to fall in, or to undivided shares, or to freeholds intermixed 'with lands of other tenure[5],' or to corporeal hereditaments parcel of a manor, and included in the sale of a manor as such[6].

Registered proprietors.

Any legal or equitable owner of a registrable interest, including a person having a power to dispose thereof by way of sale for his own benefit, and any one who has contracted to buy such an interest, may, and, where the scheme of the Acts is compulsory, a purchaser must, apply to have himself or his nominee registered as proprietor thereof, whether the interest is subject to incumbrances or not[7]. The intending purchaser, if he desires to register before completing his purchase, must obtain the consent of the vendor[8]; but fiduciary vendors may give such consent without being guilty of breach of trust[9].

Species of titles.

A registrable interest may be registered with an 'absolute,'

[1] No more Orders can be made for three years from July 18, 1898, and subsequent Orders can only be made on the application of the Councils of the counties to be affected (Act of 1897, § 20 (8)).

[2] Act of 1875, § 11.

[3] ib. §§ 2 and 11; amended by Act of 1897, § 18 & Sched. I. [4] ib. § 2.

[5] Presumably, these words mean hereditaments of other tenure. The same piece of land may be held by several tenures.

[6] Act of 1897, § 24 (1). [7] Act of 1875, §§ 5, 11; Act of 1897, § 20.

[8] Act of 1875, §§ 5, 11.

[9] ib. § 68. A trustee applying to be registered must obtain the consent of the person whose consent is necessary to a sale, ib.

'qualified,' or 'possessory' title; but application can only be made for registration with an absolute or a possessory title[1].

(*a*) *Absolute title.* A registration with absolute title can only be obtained by an applicant whose title has been approved by the registrar or by the Court[2]. Before such approval is given, public notice of the application is advertised; and opportunity is given to all objectors to appear and state their objections[3]. If the title is technically correct, the registration proceeds[4]; and if the registrar thinks that, in spite of technical weaknesses, the title is one which will not be disturbed, he makes a statement in writing to that effect, leaving the applicant to apply to the High Court for its sanction to registration[5]. Absolute title.

The effect of being registered with an absolute title is, to enable the registered proprietor to transfer to a purchaser for valuable Consideration an estate corresponding with that shown on the register, subject only to the incumbrances and liabilities appearing on the register, and to such liabilities as are by the Acts deemed not to be incumbrances[6]. These latter include tenurial rents and liabilities, succession and estate duty[7], rights of common, sheepwalk, way, watercourse and other easements, rights to mines and minerals created previously to the registration of the land, or January 1, 1898, and their incidental rights, rights of sporting and seignorial or manorial rights, drainage and other water rights and liabilities, customary rights, public rights, and profits *à prendre*, as well as tenancies not exceeding twenty-one years, under which there is actual occupation[8]. But the land may be registered Purchasers for value.

[1] Act of 1875, § 5. [2] ib. §§ 6, 17. [3] ib. § 17 (1).

[4] At least, this is the assumption. There does not appear to be any direct enactment to that effect.

[5] And, presumably, the Court may grant such sanction. But there does not, again, appear to be any direct enactment.

[6] Act of 1875, §§ 30, 35; and Land Transfer Rules, 1898, R. 92.

[7] But only if noted on the register (Act of 1897, § 13).

[8] Act of 1875, § 18; Act of 1897, Sched. I. The existence of these 'liabilities which are not incumbrances' forms one of the chief drawbacks to the value of registration.

as free of tithe and land tax; and the proprietorship of the mines and minerals may be concurrently registered[1]. And it would seem, though the matter is by no means free from doubt, that, as against a purchaser for valuable Consideration from a registered proprietor, adverse possession cannot confer any rights, although, as against other persons, an adverse possessor may himself apply to be registered[2]. Whether a purchaser for valuable Consideration from a proprietor registered with an absolute title would be affected by express notice of a hostile unregistered claim, is a point which the Acts do not decide. On the analogy of the Yorkshire and Middlesex cases, it appears that he would[3]. On the other hand, the Land Transfer Acts make express provision for protection of unregistered claims[4]; and thus, it may be said, by implication destroy the effect of notice of claims not so protected. If by reason of any actual fraud, or of any error in the register, an innocent person suffers loss, he is entitled to be indemnified by the Crown, such indemnity to be recoverable as a simple contract debt which shall, for purposes of limitation of actions, be deemed to have accrued when he knew, or, but for his own default, might have known, of the existence of his claim[5].

Volunteers.

As respects a transferee who does not give value, the transfer is subject to all unregistered claims affecting the transferor's estate[6].

Where there is registration, but no transfer, the registered proprietor remains subject to all equities affecting him at the time of registration, but not to adverse claims, other than those specified on the register, or deemed not to be incumbrances[7].

Qualified title.

(*b*) *Qualified title.* Where an applicant applies for an absolute title, the registrar may, with his consent, register his title as subject to any right arising before a certain date, or under a specified instrument, or otherwise. The effect of such a proceeding will be, to confer upon the applicant the

[1] Act of 1875, § 18 (a).
[2] Act of 1897, § 12.
[3] Ante, p. 445.
[4] Act of 1875, § 49.
[5] Act of 1897, § 7.
[6] Act of 1875, §§ 33, 38.
[7] ib. §§ 7, 13.

position and powers of a proprietor registered with absolute title, save as to claims thus excepted [1].

(*c*) *Possessory title.* A possessory title is registered upon *primâ facie* evidence that the applicant is owner of the interest sought to be registered [2]. This evidence is now prescribed by Rules 17–24 of the Land Transfer Rules, 1898, and takes the form either of a conveyance on sale to the applicant, or a statutory declaration by himself or his solicitor, to the effect that he is in possession and that he is owner, accompanied by the latest document of title which he can furnish. But such a registration does not prejudice any interest or right existing or capable of arising at the time when it was made; though in other respects it has the effect of registration with an absolute title [3]. The effect of this rule will probably be that, as respects incumbrances created since registration, a purchaser for value will be safe [4]. Where registration of title is compulsory, the title registered need not, though it may, be more than possessory [5]. Possessory title.

When an interest is once registered, the only way of dealing with the legal estate in it is by registered transfer or charge [6]. The state of the register is shewn by the land certificate furnished to the proprietor by the registrar [7], and produced at the registry for correction or re-issue, upon any change in the registered title taking place [8]. Forms of transfer and charge are provided by the Rules; and are of the simplest possible description [9]. A separate Charges-Register is kept at the Registry [10]. Registered dispositions.

[1] Act of 1875, § 9. [2] ib. § 6. [3] ib. § 8. [4] ib. § 32, and Rule 93.
[5] Act of 1897, § 20; Land Transfer Rules, 1898, R. 43.
[6] Act of 1875, § 49. The phrase 'legal estate' is, perhaps, not strictly correct. 'Estate having the statutory protection' more exactly describes the nature of the peculiar interest which can be dealt with by registered disposition only. But it very strongly resembles the 'legal estate' in unregistered interests; and the familiar phrase is more easily remembered.
[7] ib. § 10, and Rule 55. [8] ib. § 29; Act of 1897, § 8.
[9] Land Transfer Rules, 1898, Sched. I.
[10] ib. R. 2. The register contains entries of all registered charges, whether applying to registered land or not (51 & 52 Vict. c. 51. § 10), as well as writs and orders affecting land (ib. § 5).

Unregistered dispositions.

But the Acts contemplate also the protection of unregistered dealings, by means of special precautions to be taken by the persons in whose favour they are made. These precautions consist of notices or warnings entered on the register, and may take the form of simple notices, or of 'cautions,' 'inhibitions,' or restrictions.

Notices.

A Notice is the procedure applicable to the protection of interests which do not necessarily impair the title of the registered proprietor, but which might possibly be overridden by him, in exercise of his statutory powers in favour of a purchaser. Examples are, leasehold interests exceeding those which are declared by the Act not to be incumbrances[1], estates in dower or Curtesy[2], liens by deposit of land certificate[3], and certain claims by the Governors of Queen Anne's Bounty[4].

Cautions.

A Caution is a warning which entitles the person who enters it, to notice of any attempted dealing with the registered interest[5]. It is a convenient way of protecting adverse, but unestablished claims; and may be entered even before registration of the interest in respect of which it is given, in order to prevent such registration[6]. But the registrar will not delay registered dealings, unless security is given by the cautioner to indemnify every person who suffers by the delay[7]; and a person who lodges an unjustifiable caution will be liable to damages[8].

Inhibitions.

An Inhibition is an entry made on the order of the Court or the registrar, upon the application of a person interested, prohibiting, either for a specified time or generally, any further dealing with the registered interest[9]. Such entries are suitable, when an interest is registered as the property of an ecclesiastical corporation which has no power to alienate[10], or of a limited owner, whose powers of alienation are restricted[11].

[1] Act of 1875, § 50; Act of 1897, Sched. I.
[2] Act of 1875, § 52.
[3] Act of 1897, § 22. subs. 6 (f).
[4] ib. § 15 (2).
[5] Act of 1875, §§ 53, 54.
[6] ib. §§ 60–62.
[7] ib. § 55.
[8] ib. §§ 56, 63.
[9] ib. § 57.
[10] Act of 1897, § 15.

See Forms in Sched. I. to Land Transfer Rules, 1898.

A Restriction is an entry made at the instance of the registered proprietor of a registered interest, prohibiting future transfer, except upon conditions specified in the entry[1]. The registrar may refuse to accept such an entry, if he deems it unreasonable[2]. A case contemplated for the entry of a Restriction is, where a tenant for life has sold or mortgaged his beneficial interest, and it is desired to restrain him from exercising his statutory powers without giving notice to his alienee[3]. Restrictions.

When a registered proprietor dies, the person entitled by law to succeed to his interest, will be entitled to be registered as proprietor[4]. In the ordinary case, where the deceased proprietor was such either as beneficial owner, mortgagee, trustee, or executor, his personal representatives will be entitled to be registered[5]. If the deceased were entitled as administrator, the administrator *de bonis non* of the intestate will be entitled. If the deceased were a limited owner, the person next in succession, under the title by which he held, will be entitled to be registered[6]. Any person thus entitled to be registered may, instead of being himself registered, assent to or direct the registration of any heir or devisee[7]. When the new proprietor takes in a fiduciary capacity, the fact will be noted on the register[8]. Devolution on death.

Express provision is made by the Small Holdings Act, 1892[9], for the registration with absolute title of all interests acquired by a county council for the purposes of the Act; and Rules have been made[10] for the execution of this provision. Small holdings.

It has also been enacted, that the provisions of the Yorkshire Yorkshire and Middlesex Registries.

[1] Act of 1875, § 58. [2] ib. § 59.

[3] Land Transfer Rules, 1898, Sched. I.

[4] Act of 1875, §§ 40–42. Upon the bankruptcy of a registered proprietor, if the property is divisible among his creditors, the trustee is entitled to be registered (ib. § 43; Act of 1897, Sched. I).

[5] As to leaseholds, Act of 1875, § 42; as to freeholds, Act of 1897, § 1 (1).

[6] Act of 1897, § 6 (4). [7] ib. § 3 (1).

[8] Land Transfer Rules, 1898, R. 128. [9] 55 & 56 Vict. c. 31. § 10.

[10] Small Holdings Rules, 1892.

and Middlesex Registries Acts shall cease to be applicable to interests registered under the general scheme[1]. In spite of these efforts, and in spite of the facilities for searching the register provided by the Land Transfer Acts[2], it may well be doubted whether the scheme of Land Registry will meet with general acceptance, at least for some time to come. And, in any case, the machinery is too new, and the methods of its working too speculative, to justify further treatment in these pages.

[1] Act of 1875, § 127. And see 54 & 55 Vict. c. 64. Sched. I. 14.

[2] Generally speaking, no one may search a particular title without the leave of the registered proprietor. But the Charges-Register may be searched by any one, and an official certificate of the result procured (Land Transfer Rules, 1898, RR. 222–228; and 51 & 52 Vict. c. 51. § 16).

APPENDIX A.

CONVEYANCE ON SALE.

THIS INDENTURE made the day of 1883 Date.
between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] and *C.* of [*&c.*] of Parties.
the 2nd part and *M.* of [*&c.*] of the 3rd part WHEREAS by an Recitals.
indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid Consideration.
by the direction of *A.* to *B.* and *C.* and of the sum of £
paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and Receipt clause.
C. hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial Operative clause.
owner hereby conveys and confirms to *M.* All that [*&c.*] To hold Parcels.
to and to the use of *M.* in fee simple discharged from all money *Habendum.*
secured by and from all claims under the before-mentioned indentures Uses.
[*Add, if required,* And *A.* hereby acknowledges the right of Documents.
M. to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof.]

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

APPENDIX B.

MORTGAGE.

Date. THIS INDENTURE OF MORTGAGE made the day of
Parties. 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.*
Consideration. of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby
Covenant to repay. acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the
Operative clause. day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys
Parcels. to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and
Habendum. *C.* in fee simple subject to the proviso for redemption following
Proviso for redemption. (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him reconvey the premises to
Special covenants. *A.* or the persons claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness, &c.

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(*References of importance are indicated by an asterisk* *.)

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